SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 233.

THE CREDITS COMMUTATION COMPANY AND THE COMBINATION BRIDGE COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA ET AL., *Appellees*.

ALSO No. 234. SAME APPELLANTS

v.

F. GORDON DEXTER AND OLIVER AMES, SECOND, Trustees, ET AL., *Appellees*.

ALSO No. 235. SAME APPELLANTS

v.

OLIVER AMES, SECOND, AND SAMUEL CARR, Executors of the Last Will and Testament of Frederick L. Ames, Deceased, Et Al., *Appellees*.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

The appellants sought to intervene in all the above-entitled cases, and, for that purpose, filed substantially the same petition in each.

A remarkably clear and condensed statement of so much of each case as the Circuit Court thought to be

necessary to sustain a denial of relief to the appellants was made by Judge Sanborn.

Opposing counsel made liberal quotations from this statement in their printed briefs filed in the Court of Appeals, and so we now quote that statement in full.

It presents all the points of argument not sufficiently indicated in the petition itself, and may be adopted as a statement of facts, good so far as it goes. It will be supplemented where necessary in the argument.

The opinion and decision of the Circuit Court:

Judge Sanborn: "The Combination Bridge Company, a corporation of the State of Iowa, and the Credits Commutation Company, another corporation of the same State, have filed a petition for leave to intervene in three suits against the Union Pacific Railway Company.

"In the order in which these suits are brought, one of them (No. 235), is a suit brought by stockholders of the Union Pacific Railway Company for the appointment of a receiver, the administration of the insolvent estate, and the prevention of the dissipation and disintegration of the properties of the Union Pacific Railway Company.

"The second (No. 234) is a suit brought by the trustees of the first mortgage bondholders of that company to foreclose the mortgage.

"The third is a suit (No. 233) brought by the United States to foreclose the lien upon certain portions of the property of the Union Pacific Railway Company imposed upon those properties to secure a debt created by the subsidy bonds.

"The Combination Bridge Company is the owner of a bridge across the Missouri River at Sioux City. The Credits Commutation Company is the owner of the stock of the Combination Bridge Company. It is also the beneficiary under an assignment of three-

fourths of the stock of the Sioux City & Northern Railroad Company, which owns a railroad extending northerly from Sioux City for a distance of one hundred miles. It also owns a portion of the stock, or all of the stock, as a beneficiary under the assignment, of the Sioux City, O'Neill & Western Railroad Company, which has a railroad extending westerly from Sioux City to the town of O'Neill, and the stock of a certain terminal company, which has large improvements in the city of Sioux City.

"The general, perhaps the universal rule, is that no one is a proper party to a foreclosure proceeding unless he has some interest in, title to, or estate in the mortgaged property or some lien or claim upon it.

"The petitioners claim the right to intervene upon three substantial grounds:

"First, they say they are entitled to intervene for the purpose of procuring the insertion in the decree of foreclosure of a provision which shall substantially embody section 15 of the act of 1862. Section 15 reads thus:

"'*That any other railroad company now incorporated or hereafter to be incorporated shall have the right to connect their road with the road and branches provided for by this act at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors and assigns, the same as if the words had been properly added thereto.*' (12 Stat. 489, C. 120.)

"There are two answers, which seem to us to be conclusive, to the claim of the petitioners to intervene upon this ground: First, neither the Combination Bridge Company nor the Credits Commutation Company has built any railroad to a connection with the Union Pacific Railway Company or its railroad. They have procured no right of way. They have accumulated no fund for the purpose of constructing a railroad. They have given no assurance by bond or by statement or moneys deposited safely

in some depository ready to be used, that they will within a limited time or within any time build a railroad to a connection with the Union Pacific railroad. We fail to see, therefore, that they have any tangible, actual interest in or lien upon the property of the Union Pacific Railway Company. The second answer is, that whatever their right or interest may be, it is nothing more than a contingent, speculative future possibility. It is contingent, because it is conditioned upon the construction of a railroad. It is speculative, because it depends for its existence upon the question whether or not capitalists shall see sufficient profit in the construction of such a railroad to induce them to put in the necessary money for that purpose. It is future, because it has not yet come into existence, and it is possible because it may come into existence.

"Courts of equity are not accustomed, perhaps they have not the power, to adjudicate upon possible rights which are not in being and which are merely susceptible of coming into being at some unlimited time in the future.

"The second ground on which the petitioners seek intervention is that one of them, the Credits Commutation Company, is the owner of one of the first mortgage bonds of the Union Pacific Railway Company and the owner of eleven shares of its stock. There are two reasons why the ownership of this bond and this stock is insufficient to give it a right to intervene in these suits. The first is that the allegations of the petition show that the bondholder is represented by his legal representatives, the trustees of the bondholders under the first mortgage, and the stockholder is represented by the Union Pacific Railway Company in all these suits, and there is no allegation or showing in the petition that the trustees for the bondholders or the Union Pacific Railway Company has entered into any combination, has committed any fraud, or has neglected any duty, whereby any injury is threatened to, or will result in any way to either the bondholder or the stockholder. Indeed, it is a fair inference from the petition that the trus-

tees for the mortgage bondholders are protecting the interest of this bondholder better, and are procuring for it more in value than the face of the bond and interest. There is no allegation in the petition that the stock of the Union Pacific Railway Company held by the Credits Commutation Company was, at the time of the combination referred to in the petition, of any value, or that it can be made of any value by granting the prayer of the petition and inserting in the decree the provision which the petitioners ask to have inserted. We think, on the other hand, that the indications of the petition are strong, that to grant that relief would tend rather to the injury than to the benefit of both the bondholder and the stockholder.

"There is another ground upon which intervention is sought. It is that these petitioners are members of the public and that they have the right to intervene for the purpose of protecting the interests of the citizens of the Republic. But the answer to that is that the United States by the officer upon whom the duty is imposed of protecting in this litigation the interests of all the citizens is prosecuting one and defending the other of the suits for foreclosure. As a member of the public, neither of the petitioners has an interest different in kind from that of every other member of the public resident in the same locality, and upon well settled principles they are not entitled to intervene upon this ground."

The decision of the Court was as follows:

"And now this cause coming on to be heard on the petition of the Credits Commutation Company for leave to intervene in the above entitled causes, and also upon the amendments to said petition presented on the hearing and taken as a part of said petition, and also upon the supporting petition of the Combination Bridge Company, also presented to the Court on said hearing, and upon the order of this Court made on April 28, 1897, upon the said petition of the Credits Commutation Company; and it appearing to the Court here that the several parties had been

notified of the time and place of said hearing as specified and required by the said order of this Court, and there appearing upon this hearing for the Credits Commutation Company and for the Combination Bridge Company, petitioners, Mr. John C. Coombs, and Mr. Henry J. Taylor, for the Union Pacific Railway Company, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers thereof, Mr. John F. Dillon and Mr. W. R. Kelly, for F. Gordon Dexter and Oliver Ames, Second, Trustees, Mr. Winslow S. Pierce, and for the United States of America, Mr. George Hoadly and Mr. John C. Cowin; and now the Court having heard arguments of counsel and being fully advised in the premises, it is

"*Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied,* **NOT AS A MATTER OF DISCRETION**, *but because said petitions do not state facts sufficient to show that the petitioners or either of them have a legal right to intervene, and upon prayer of the petitioners an appeal to the Circuit Court of Appeals is hereby allowed. The bond on such appeal is fixed at the sum of one thousand dollars.* * * *

There was a colloquy between the Circuit Court and counsel for the respective appellees after the rendering of the opinion, and which the stenographer preserved. Leave is asked of the Court and appellees to refer to it for the purpose of showing how distinctly it was understood that the Circuit Court denied the petitions *purely as a matter of law, and with the express purpose of having its decision reviewed on appeal.*

ASSIGNMENT OF ERRORS.

The assignments of error were the same in each case, and were as follows:

"1. Because the Court erred in denying the petitions of said Credits Commutation Company and

said Combination Bridge Company, for leave to intervene herein.

"2. Because the Court erred in the decreeing that the petitions of said Credits Commutation Company and Combination Bridge Company, do not state facts sufficient to show a legal right to intervene on the part of said intervening petitioners.

"3. Because the Court erred in not granting the petition of the Credits Commutation Company for leave to intervene herein.

"4. Because the Court erred in denying the petition of the Credits Commutation Company for leave to intervene herein.

"5. Because the Court erred in not granting the petition of the Combination Bridge Company for leave to intervene herein.

"6. Because the Court erred in denying the petition of the Combination Bridge Company for leave to intervene herein."

The foregoing errors are re-assigned in this Court, together with the following as additional:

And further severally and separately each for itself says that the decree or order in said cause made and entered on the 7th day of December, 1898, in said United States Circuit Court of Appeals for the eighth circuit is erroneous and against the just rights of each of these appellants, and that there is manifest error therein for the following reasons:

Because the Court erred in denying the petition of said Credits Commutation Company and said Combination Bridge Company for leave to intervene in said suits.

Because the Court erred in decreeing that the petitions of said Credits Commutation Company and Combination Bridge Company do not state facts sufficient to show a legal right to intervene on the part of said intervening petitioners.

Because the Court erred in not granting the petition of the Credits Commutation Company for leave to intervene herein.

Because the Court erred in denying the petition of the Credits Commutation Company for leave to intervene herein.

Because the Court erred in not granting the petition of the Combination Bridge Company for leave to intervene herein.

Because the Court erred in denying the petition of the Combination Bridge Company for leave to intervene herein.

Because the Court erred in its final order and decree herein under date of December 7, 1898, in sustaining appellees' motion to dismiss the appeal from the Circuit Court of the United States for the district of Nebraska, and in dismissing said appeal.

BRIEF OF THE ARGUMENT.

It is assumed that it is unnecessary to recite as a whole the story of the Pacific railroads.

The laws are the principal facts and are a part of our history.

A Preliminary Concession.

Possibly because of the foregoing, and for consistency with the views which the appellants entertain, a preliminary concession should be made by the appellants.

Thus: It is submitted that the acts for the creation of the bond-aided Pacific railroads are contracts between the United States and the companies they created and endowed.

The source of the aids bestowed was the liberties, the lands, and the money of the people, and these were granted in consideration of the construction, maintenance and operation of a railorad and telegraph line from the Missouri River to the Pacific Ocean, all as stipulated.

Congress relied for sanction of its acts on its power "to provide for the common defence and general welfare," "to regulate commerce . . . among the several States," and "to establish post offices and post roads."

Neither the executive nor judicial departments can supersede or destroy provisions made by Congress for these purposes.

To attain and secure these ends Congress created and retained certain control over the Pacific railroad companies and their roads, and reserved that "at all times . . . Congress may at any time . . . add to, alter, amend or repeal" the acts (Sec. 8 of the Act of July 1, 1862.)

U. S. v. *Union Pacific Ry. Co.*, 160 U. S., 1.
U. S. v. *Stanford*, 161 U. S., 412.

To the extent, therefore, in which action in the premises was or is constitutional at all, it is within the exclusive power and under the exclusive control of the legislative branch of the government; and except as otherwise expressly authorized by Congress under a strict construction of its acts, the power and control of Congress in the premises is free from interference by the executive or judicial branches or both of them combined.

In addition to this, it is submitted that no court can entertain suit against the United States or their interests without the express authority and consent of Congress; and it is added that this is especially true of the properties and interests of the United States in the Pacific railroads.

At the time each of the foreclosure suits was begun, in which suits intervention is sought by the appellants, everything involved in both of said foreclosure suits was pending in Congress as immediate and unfinished business.

As these petitioners believe that, for want of authority, the Circuit Court has no jurisdiction in either of the foreclosure suits, they ought, perhaps, to concede that they themselves should have no standing in such suits for any purpose but to suggest want of jurisdiction.

Subject to the foregoing concession, and assuming that the Circuit Court has jurisdiction, the appellants submit:

To sustain a bill or intervening petition for protection or relief in equity, a complainant must show that he has some right or interest that is threatened with imminent or irreparable injury, for which damages cannot be recovered or would be inadequate, and for which injury he would not have a plain, adequate and complete remedy at law.

And further, that when such injury is threatened to arise from the prosecution of pending equitable procedure between other parties, the superior right to relief carries with it a right to intervene in a pending suit or to do anything else which will reach the source of and stay the injury; otherwise there would be a wrong without a remedy. There is nothing peculiar in the rules or rights of intervention.

Precedent sustains, if it does not absolutely require, the discretion of the Court to go much further than this,

and to admit all the interveners who show "some interest in some branch of the case."

McKENNA, J., in *Southern Pacific Co.* v. *Board of R. R. Commissioners*, 71 Fed. Rep., 437.

The appellants seek to intervene in these suits in three capacities.

It is submitted that the opinion and decision of the Circuit Court is to the effect that *as a matter of law* the appellants did not show any right or interest in either of these capacities, which the Court could, even in its discretion, entertain.

The appellants submit consideration of their rights and interests in each of these capacities in their order.

The petition is divided into two parts: One in which the appellants seek to intervene to preserve and secure a right to a connection with the Union Pacific railroad, *notwithstanding and to survive any foreclosure sale of that road.* The other purpose is in the alternative: that if the appellants cannot secure such survival of that right, then they ask to intervene to prevent any foreclosure sale which might deprive them of that right. For the purposes of a hearing before this Court, it is thought that the alternative remedy is sufficiently argued in the petition itself. And this brief will be substantially confined to a support of the right of the petitioners to intervene to preserve and secure the right to connect and of their right to maintain an appeal from the order of the Circuit Court denying their legal right to intervene.

PART ONE.

The appellants and each of them severally seek to intervene as and for a railroad company or companies

now or hereafter to be incorporated, to protect and secure the right of the appellants or such railroad company to build a railroad from Sioux City, Iowa, to a junction with the Union Pacific Railway under the provision of Section 15 of the Act of July 1, 1862. (12 Stat., 489, Ch. 120).

Section 15 of the Act of July 1, 1862, reads as follows:

"*That any other railroad company now incorporated or hereafter to be incorporated shall have the right to connect their road with the road and branches provided for by this act at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.*"

Substantially the whole right of the appellants to intervene upon this ground rests upon the proposition that, in consideration of the aid bestowed upon the Pacific companies, certain *obligations and servitudes* were imposed upon the companies and their roads. Some of these obligations and servitudes are due to the United Stats as such; some of them are due to the various sections and the people thereof, or to the citizens. For the preservation and enforcement of the obligations and servitudes not due to the United States as such, no intervention on the part of the United States, or its law officers, is competent or necessary, but every citizen has standing to protect his own interests.

Such division of the beneficial consideration between the State as such and the citizen prevails in the bestowal of most all quasi-public franchises, and has been emphatically declared, in respect of the consideration to be ren-

dered by the Union Pacific Railroad, by a decision of this Court.

Union Pacific R. R. Co. v. *Hall*, 91 U. S., 343.

The appellants submit that their right to build to the connection sought is supported by corresponding obligation and servitude imposed upon the Union Pacific Railroad, expressly running with that road into the hands of any company which might lawfully succeed the company named in the act, and which servitude is therefore prior in lien to any mortgage whatever,—an organic servitude.

The easement of that servitude does not pertain to the United States as such, but to any of the people—these appellants—who, in good faith, wish to use it.

Of equal importance to the appellants as is their right and interest to connect, is the protection of the power and freedom of the President, or some other tribunal, to fix and limit the right and to prescribe the "just and equitable terms" on which it is to be enjoyed.

The appellants submit that the power conferred upon the President to prescribe the places at which and the just and equitable terms upon which other roads might connect with the Union Pacific are in kind much like those generally bestowed upon County Commissioners for the laying out of highways, or upon Railroad Commissioners for authorizing the location of railroads. Both of these boards are ordinarily clothed with a wide discretion to act as public necessity and convenience may require. It is true that it was undoubtedly contemplated that the President would also consider the effect of such connections upon the business and earnings of the Pacific roads; certainly so long as they should be indebted to the United States.

But on the other hand, it is submitted that in the exercise of powers greater than are commonly bestowed upon any commissioners, the President would look over the whole country and beyond its borders, having in view the military and postal service of the country "at all times but especially in time of war," the preservation of domestic tranquility, and the promotion of the general welfare, for which objects so large a public expenditure had been made; and that an appeal to his discretion to prescribe the place at which and the "just and equitable terms" upon which the appellants should connect with and thereby extend and enlarge the usefulness of the Union Pacific road would invoke a consideration of public and local interest worthy of determination by the chief magistrate of the United States.

It is repeated that appellants assert an easement in their own behalf in the Union Pacific Railroad, and that, in accordance with the provisions of the 15th Section of the Act of July 1st, 1862, it underlies all mortgages—*is an organic servitude.*

There are two mortgage liens on the Union Pacific road:

First, by the act of July 1st, 1862, there was created an *ipso facto* first mortgage to the United States to secure a repayment of any subsidy bonds which might be issued to the companies. This was not in fact a mortgage or lien at all, though it was so called. It was the reservation of a reverter for breach of condition subsequent on a failure on the part of the companies to redeem the bonds.

Act of July 1, 1862, Sects. 5 and 6.
Act of May 7, 1878 (Thurman Act), Sect. 11.
U. S. v. *Union Pacific Railroad Co.*, 91 U. S., 72.

This reverter extended to all "rights, functions, immunities, and appurtenances," and all lands granted by the United States which should be unsold.

This reverter was in the Thurman Act (May 7, 1878, Sect. 11) expressed to cover "all rights, privileges, grants, and franchises derived or obtained from the United States."

In this Act of 1862, in Section 15, the right of other companies was secured to connect at such place and on such just and equitable terms as the President should prescribe.

It is not presumed that the United States would, in the event of a reverter to themselves, deny the right.

Other successors could not deny it for the provision that "associates, successors, and assigns" should be included wherever the word "company" was used, is incorporated in the 15th Section itself.

The Act of July 2, 1864 (13 Stat., 356, Chap, 216), gave no affirmative lien to the first mortgage bondholders. It allowed the companies to issue their first mortgage bonds, but limited the authority for their security thus:

> "The lien *of the United States bonds* shall be subordinate to that of the bonds of any or either of said companies . . . upon their respective *roads, property* and *equipment*."

That was all. The bondholders took their bonds with full notice of the provisions of the Act of 1862, to which the Act of 1864 was an amendment only.

Thus the obligations and servitudes imposed upon the Union Pacific Company and its road, not due to the

United States as such but to any citizen who has any wish or interest to avail of or enforce them, were not only expressly perpetuated under the Act of 1862 as against any company that might come into possession of the road, but in the Act of 1864 they were not included in the subordination to the lien of the first mortgage bonds.

The appellants assert that their interest is an easement supported by a servitude that runs with the land—an organic servitude.

If exception be taken to these terms, then the appellants submit that there is at least in their behalf such easement and servitude inchoate supported by a right to have the President determine and limit it, and that upon such limitation it will be consummate and vested, and the uses and enjoyment whereof can then be enforced by mandamus.

The foregoing is an outline of the appellants' claim of right and interest.

Act of March 3, 1873.
Union Pacific R. R. Co. v. *Hall*, 91 U. S., 343.

If such right and interest may be thought to be established, the only remaining question is as to whether or not those rights and interests are threatened with any determent or extinction in these proceedings. If so, appellants are of right and even of necessity entitled to standing.

The rights and interests of the appellants are jeopardized:

First, Because They are Denied by the Appellees.

A frequent ground for entertaining intervention, and one most commendable in behalf of prompt and practical

administration of justice is this: that the right or interest asserted by the intervener is denied by the parties to the suit.

Such denial impliedly admits the injury, if the right and interest exist, and equally that intervention is appropriate or necessary for protection.

The court having jurisdiction of the property in which the interest is asserted, and of the issue thus raised, and of all the parties, makes short work of the controversy by deciding it.

Joy v. *St. Louis*, 138 U. S., 1.

It is submitted that the Circuit Court did so *pass upon the merits* in this case; wherefore the appeal was from an adverse decision upon the appellants' rights and not from any discretionary judgment as to whether the appellants' remedy should be by intervention or by an original suit.

The Circuit Court itself said that the right, and not a remedy within the discretion of the court, was the issue determined. That Court "ordered that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, **NOT AS A MATTER OF DISCRETION,** but because said petitioners do not state facts sufficient to show that the petitioners or either of them have a **LEGAL RIGHT** to intervene." The order of the Circuit Court carefully recites the notice to all parties in interest, the appearance of counsel for all the substantial interests, the hearing and the arguments. Indeed, the appellees introduced evidence in the form of affidavits which, though not referred to in the opinion or order, it was understood the appellees might avail of on appeal.

Though these appellants always deny that their rights can be extinguished, it is nevertheless submitted

that the charge in their petition that their rights were ignored and denied and threatened with extinction in these proceedings is fully sustained.

That intervention was, therefore, not only appropriate, but, in the light of the decision, was necessary, and on the face of the record their sole relief lies in the maintenance of their appeal.

If their appeal be not entertained, or be dismissed, then an adjudication upon the merits which the appellees themselves put in issue in fact, and on which they prevailed, would stand both final and unreviewable in the subordinate court, all of whose determinations that are not discretionary or interlocutory, or all that purport to be final of any right or interest, are, without exception, appealable.

The law upon which the appellees relied as fact for a denial of the appellants' claims to connection under the provisions of Section 15 of the Act of 1862, does not appear in the petition.

There was but one objection raised by them which challenged the petition peremptorily on its merits.

The remaining objections were in their nature dilatory or evasive, and will be noticed later.

All objections, however, practically conceded that the appellants once had, or on the performance of some alleged condition precedent—or but for the impending foreclosures—might have the connection in the manner claimed for it.

The substantial denial and contention of the appellees was this: That the rights of the appellants and the power of the President had been superseded:

First, by Section 5257 of the Revised Statutes of the United States, which reads as follows:

> "Any railroad company now or hereafter incorporated under the laws of the United States, or of any State, which has been or may be organized under an Act of Congress, may connect its road with the Union Pacific Railroad or any of its branches."

And again by Section 562 of the Consolidated Statutes of Nebraska, in which State the appellants' connection would have to be made, and which section reads as follows:

> "Every railroad company shall have power to cross, intersect, join and unite its road with any other railroad before constructed."

Judge Dillon, who presented this argument, cited *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S., 667; *Oregon Short Line* v. *N. P. R. Co.*, 61 Fed. Rep., 158.

From the first of these cases he argued that a provision in the Constitution of Colorado, similar to the law of Nebraska, required only a *mechanical* union of the roads; and from the second case he showed that nothing more than such mechanical union was imposed either by the third section of the Interstate Commerce Act (24 St., p. 380) or by a provision in the Northern Pacific Act, which required the Northern Pacific to form "running connections" with other roads "on fair and equitable terms."

Judge Dillon thus expanded the original right to connection with the Union Pacific until it pertained to everybody, and correspondingly limited its terms until it was of no value to anybody.

Judge Dillon represents the defendant company. He strives for its death in the hope of profit for its stockholders in the reorganization, when the new company shall be free from all the obligations, servitudes and duties of its predecessor.

The counsel for the United States concurred in his position and argument; so did the counsel for the first mortgage bondholders, he being also the representative of the Reorganization Committee.

Between these parties—both of the vendor mortgagees, the defendant company and the purchasing Reorganization Committee, and in pursuance of an order which denied that the appellants have any interest to protect which entitles them to be heard—the road is sold and bought.

It is submitted that if the appellants have any rights or interests, as asserted by them, they were not only endangered, but destroyed by these proceedings unless this Court shall review and reverse the orders of the Circuit Court and Circuit Court of Appeals.

The difference between a "mechanical union" or "physical connection" merely, and a connection at such place and on such just and equitable terms as the President of the United States may prescribe—a business connection—is the measure of the possible right and interest which the appellants assert.

It is conceded that if subsequent legislation of the United States under the Interstate Commerce Act, or Section 5257 of the Revised Statutes, or the local statutes of Nebraska, have abrogated or superseded Section 15 of the Act of July 1, 1862, then there is no substantial value

left in the right and interest which this petition is brought to protect.

Further, if the Revised Statutes, Section 5257, can possibly apply to any railroad companies not incorporated under the laws of the United States, nor organized under an act of Congress, then it is admitted that the rights secured to such railroads under Section 5257 are not so broad or beneficial as are the provisions of Section 3 of the Interstate Commerce Act (24 St., L. 380), which reads as follows:

> "Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their respective lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. But this shall not be contstrued as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

In *Oregon Short Line and U. N. Ry. Co.* v. *Northern Pacific R. R. Co.*, 61 Fed. Rep., 158, the Circuit Court of Appeals for the Ninth Circuit held, practically, that the foregoing provision was enacted because "railroads had refused to accept or deliver traffic on any terms, and thereby froze out connecting lines." And the Court expressly refused to find that any "common law rights were enlarged thereby." The same Court, also, in the same case, said, in respect of the duty which had been imposed upon the Northern Pacific Railroad Company, "to permit any other railroad . . . to form running connections with it on fair and equitable terms" included only "such arrangement as to the time of arrival and departure of trains and as

to stations, platforms and other facilities as will enable the companies desiring to connect to do so without detriment or serious inconvenience."

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S., 667, it was held (headnote):

> "The right of one railroad company to connect its road with that of another company, which has been made a part of the fundamental law of the State, implies no more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not include the right of business intercourse between the two companies."

The opinion of the Court in this last cited case is almost exhaustive, and shows how meagre are the rights of a connecting line entitled only to "mechanical union."

In short, if the measure of the appellants' rights under Section 15 of the Acts of 1862 are reduced to those secured under Section 5257 of the Revised Statutes and under the Consolidated Statutes of Nebraska, but subject to the unrepealed provision that the President of the United States may prescribe the place and the just and equitable terms of the connection—then all that the President of the Republic can do, but which he is requi[illegible] to do, is to determine north of whose barn or south of whose potato patch the switch shall be put in, and to arrange the time tables of the two roads as to the arrival of their respective trains on the north or south side of a country station.

It is submitted that this is not what the Congress and the people had in contemplation when, under enormous bounties, there was created "A GREAT NATIONAL HIGH-

WAY UNDER NATIONAL CONTROL, * * * so far as the public and the government were concerned, **AS ONE CONTINUOUS LINE.**"

U. S. v. *Stanford*, 161 U. S., 412.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.

It is thought that the provisions of the Consolidated Statutes of Nebraska and the decisions upon the terms of the Constitution of Colorado need not be regarded.

Decisions interpreting regulations which a legislature or a people may establish for the connection of all railroads, in none of which roads the State as such or the people have any financial interest or easement whatever are not precedents nor are they analagous.

So, too, in respect of the Northern Pacific, whose connection with the Government and the people practically closed with the receipt of their land grants.

The distinguishing features of the relation of the bond-aided Pacific railroads to the Government and to the people have been so repeatedly and exhaustively considered by the Supreme Court as to permit of but little argument. "The citation of a single instance should suffice."

U. S. v. *Union Pacific Ry. Co.*, 160 U. S., 1.

See also *U. P. R. R. Co.* v. *U. S.*, 99 U. S., 700; also 50 F. R., 42; 91 U. S., 72; 161 U. S., 412, 432-3; *vide* also Morawetz, Sec. 1116; 101 U. S., 71-83. It must be remembered that both the constitution of Colorado and the laws of Nebraska referred to railroads in which those States had no financial interest and the construction had to be as it was in order to save the constitutionality of these enactments under the constitution of the United States

which forbade the States to impair the obligations of contracts. In the case at bar, the right to join the Union Pacific was contained in its charter, and so was a part of its contract.

Coming to Section 5257 of the Revised Statutes, the first question is whether, by its plain reading, it permits any connection with the Union Pacific Railroad, of the road of any company not incorporated under some law of the United States or organized by an Act of Congress. It is submitted that it does not; so that, as to such companies, Congress by the act of incorporation or organization thereof would take to itself the determination of the place at which, and the just and equitable terms upon which, such road should connect with the Union Pacific.

It is again submitted that the Statute cannot refer to railroad companies organized or incorporated under the laws of the United States or of any State, since this would seem to be a wanton discrimination against the territories dependent upon the Pacific railroad system, and which territories have been accustomed to incorporate railroad companies.

But if it can be entertained that the section relates to all railroads organized or incorporated under the laws of the United States or of any State, there yet remains to consider whether, by implication, it repeals Section 15 of the Act of July 1st, 1862.

The appellees themselves did not dare to suggest that it operated as such repeal. Every rule of construction is against such contention, and its adoption in respect of our laws in relation to the Pacific roads is practically forbidden for the sheer disaster and consequences which would follow.

The most that the appellees asserted in behalf of the section was that Section 5257 "is a ratification and permanent enactment of the 15th Section under discussion." The answer to this is short. To be construed as a ratification and permanent enactment of Section 15 of the Act of 1862, it must be its equivalent.

It must be conclusively presumed that a "mechanical union" anywhere is equal to and includes *every* just and equitable term which the President of the United States might prescribe.

The appellees did not believe this themselves.

They would not have Section 15 of the Act of 1862 incorporated in the decree.

We ask leave again of the Court and of the appellees to quote from the hearing:

> Judge Sanborn: "Perhaps, Mr. Coombs, the counsel on the other side would be willing to concede that there should be such a provision inserted in the decree. How is that, Mr. Pierce?"
>
> Mr. Pierce: "It is in the law now, if your Honor please, the most ample and complete provision for connection."
>
> Judge Sanborn: "But the question is whether you are willing that there should be inserted in the decree the same provision."
>
> Mr. Pierce: "The provision, as I understand, your Honor, for mechanical connection with the property, that is the construction which has been given by the Supreme Court to provisions in sections for connections of this character, the mechanical union of the property. I do not think there would be any objection——"
>
> Mr. Hoadley: "This is not the time now. If the Court please, when Judge Cornish come to the hearing, there will be a good deal to be said about——"

Judge Sanborn: "There will be, but if you are willing that this question should be inserted in this decree, it is unnecessary to further argue this matter."

Mr. Hoadley: "I don't believe I am willing to put in anything that would satisfy Mr. Coombs. I know him too well for that. If you concede one thing that he wants, he wants another. I don't mean anything against my friend Coombs."

Judge Sanborn: "Mr. Coombs, you may proceed."

The appellants have no hesitancy in submitting this question to the Court practically without other argument than the statement of it. The Circuit Court did not deem the contention of appellees worthy of reference in its opinion as a ground for its decision, but reached its conclusions on the dilatory and evasive objections raised.

The Evasive and Dilatory Objections.

The Circuit Court, in speaking of the appellants' right to the connection, said:

"There are two answers which seem to us to be conclusive to the claim of the petitioners to intervene upon this ground: First, neither the Combination Bridge Company nor the Credits Commutation Company has built any railroad to a connection with the Union Pacific Railway Company or its railroad. They have procured no right of way; they have accumulated no fund for the purpose of constructing a railroad; they have given no assurance by bond or by statement or moneys deposited safely in some depository, ready to be used, that they will, within a limited time, or within any time, build a railroad to a connection with the Union Pacific Railroad. We fail to see, therefore, that they have any tangible, actual interest in or lien upon the property of the Union Pacific Railway Company."

To these objections, as a matter of law, the appellants demur, and to their equity they take exception.

The law prescribes no such conditions precedent to the preservation of the appellants' rights, and if it did a court of equity should afford to the appellants an opportunity to satisfy the conditions before destroying or forfeiting the right.

But the law does not impose the conditions. The whole implication of the Statute and much of its expression is to the contrary.

The construction of the Circuit Court involves an absurdity, to-wit: That the Company must build its railroad before it can ask the President to locate it.

Indeed, the provision of the section under which the appellants claim, that any railroad company *now or hereafter to be incorporated*, affords an exception to the usual railroad incorporation.

That is to say, the location or route of a railroad company is ordinarily a part of its charter, but this act practically prohibits locations until the sanction of the President and the terms of the connection are *pre*-scribed.

The President would have much to consider—the public necessity and convenience to be served, possibly the conflicting claims of different sections, the effect upon the earning capacity of the Union Pacific. On the other hand, the applicants would learn something of the prospective value of their undertaking.

Capital must not only follow the *right* to embark, but will only follow the approval of the enterprise; it cannot precede either.

Judge Hoadley further suggested that the appellants "fail in failing to show that the President has fixed the point of connection."

This, too, is temporary and evasive.

It is admitted that the President had not been asked to do so, but he was afterwards though since the hearing and before the sale; and the appellants' rights cannot be sacrificed by the President's delay.

The foregoing is perhaps a sufficient answer under the law to legal objections not found in the law.

In addition to this, and to show that the appellants have not slept upon their rights, the Court is reminded from the petition:

The Union Pacific Railroad has been in the hands of receivers since 1893; it was there before the appellants' bridge was completed.

These petitioners believed that these matters were to be adjusted before another tribunal. They have been constantly before the committees of two Congresses, seeking to protect their interest in the premises in legislation which then was and prior to the filing of said foreclosure bills had been pending. While they were thus engaged, and while the Congress was intent upon the disposition of substantially all interests involved the appellants were surprised to learn of the filing of the bill herein in behalf of the United States and the purported entry of an appearance by or for the United States in the prior foreclosure suit for the first mortgage bondholders.

The appellants submit that since the road has been taken into the custody of the judiciary, it would be a seeming discourtesy, if not contempt, for the President to interfere and authorize a direct connection with it.

The general assumption by the Court that the appellants have not made sufficient preparation by their works to entitle them to the connection, it is submitted, is not considerate.

The appellants' petitions show two railroads, a railroad bridge, and large terminal properties in and entering Sioux City, and large stock yards and packing plants which draw their supplies from all the territory occupied by the Pacific roads.

All these cost about ten millions, and the transportation properties were designed, acquired, and constructed to accommodate, and all depend upon, some southwestern and transcontinental railroad connection, and all are demonstrably of little or no value without that. (No. 233, p. 151.)

The original petitioner, the Credits Commutation Company, has no present capacity to own and operate railroads. It can, however, under the laws of Iowa easily and at will enlarge its powers by amending its articles at any time.

Its co-petitioner for the connection, the Combination Bridge Company, has such powers, and has recently completed a railroad bridge across the Missouri at a cost of about a million and a quarter. All the stock of this last named company is owned by the Credits Commutation Company. Over this bridge the Sioux City, ONeill & Western Railroad, 130 miles long, comes into Iowa from Nebraska. The Credits Commutation Company owns substantially all of the stock of that company, too. The bridge is within ninety miles of the Union Pacific main line at Columbus, and is within about sixty miles of a branch of it at Norfolk. The Sioux City, O'Neill & West-

ern road runs to within about seventy miles of the Union Pacific main line at Columbus, and within twenty-five miles of the Norfolk branch of it.

That is about as near to a connection as the appellants could come without discourtesy to the President or contempt of the Court.

The Combination Bridge Company's railroad bridge is a railroad.

> *Ry. Co.* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S., 371.

Not only so, but Judge Hoadley, who had been counsel in the case just cited, was kind enough to say at the hearing:

> Mr. Hoadley: "Mr. Coombs, that case helps you a great deal more than you think. It assumes, it don't decide. I tried to get the Court on a second hearing to decide that that bridge, having a railroad to which the C. C. & I. C. Company reached within two hundred miles and no nearer, under a law of Illinois, that there is such a contract as this, when they touched each other, to make contract, *and I suppose that in the opinion of the Supreme Court of the United States I am justified in assuming that two hundred miles is touching distance.* It is further than your hypothetical point of connection is in this case, but I never could get the Court to come up to the scratch and tell me why it was."

It is submitted that the appellants make the largest private bid of wish and ability that was ever offered in the West for a right to participate in a public benefit.

A second dilatory argument was made by Judge Dillon and adopted by the Circuit Court in its second answer to the appellants' claim of right to connect. It was this:

Judge Dillon expressed it in a quotation from *Cross* v. *DeValle*, 1 Wallace, 14, as follows:

> "A chancellor will not maintain a bill merely to declare future rights. The Scotch tribunals pass on such questions by declarator, but the English courts have never assumed such power. In *Langdale* v. *Briggs*, Lord Justice Turner remarks: 'As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they may come into possession.'"

This case and those on which it relies do indeed hold in respect of the somewhat curious and nearly antiquated real estate law that a conflict of interest to arise upon the vesting of a contingent remainder, if the remainder ever vests, will not be entertained by the court before that event; especially, as the Court say, when the parties are not before the court nor yet born.

But there are exceptions even to that.

The head-note of the case goes on:

> "There are exceptions to this rule, as bills filed by executors or trustees for a construction of a will *and the direction of the court as to the disposition of the property.*
>
> "In such cases from necessity, and in order to protect the trustee, a court will settle questions as to the validity and effect of contingent limitations in a will *even to persons not in esse* in order to make a final decree and give proper instructions in relation to the execution of the trusts.
>
> "But where no such necessity exists, the court has no power to decree as to future rights of parties not before the court or *in esse*."

If that law has anything to do with this case, the case is within the exception.

The case referred to is otherwise an authority for the appellants.

The Statutes vest in the President of the United States a power in trust for the appellants. It is a power coupled with an interest in the United States and in the people, and there is to be a disposition of the property.

The Circuit Court, however, adopted the argument of the appellees, and in respect to the appellants' claim of a right to connect, said:

> "Our second answer is that whatever their rights may be, it is nothing more than a contingent, speculative, future possibility."

The Court erred. The *right* is in no such doubt; the *road* may be. So is justice, but not so the right to it; so is everything except the past, and so was that. If such material conditions or doubts oust jurisdiction of the right, the only interests left for courts to consider are those concerning which there can be no controversy.

But see *Peter* v. *Farrel, etc., Co.*, 42 N. E. R., 690, 697.

It is true that adverse interests and discriminations may, as heretofore, again postpone the building of a connection from the Middle Northwest to enjoy the easement to which that section is entitled in this property.

But a servient estate cannot be sold free of an easement of light because the dominant one is not yet built upon, nor because night is approaching and tomorrow's sun has not risen today.

The third dilatory suggestion and argument were made by Judge Hoadley. They were not adopted by the Circuit Court. They amounted to this:

To sell the property first and find out what was sold afterwards. He said, in substance, that if the appellants' rights were unsaleable they would not be hurt, and if they were saleable they would be destroyed and could no more be heard to complain.

He puts it thus :

> "Mr. Coombs has worked himself into a dilemma, and he don't know it. This provision is either a provision of general law which is binding for all time until repealed, or it is a provision of private law, binding on the Union Pacific Railroad for all time until repealed, or it is nothing. *If it can be wiped out by a foreclosure, it is binding on nobody.* Your Honor can't use your discretion as a judge to incorporate into the decree, as a provision of contractual obligation, this section unless it is a section embodied in the law of the land, for the government of the Union Pacific, always." . . . .
>
> "It is a physical connection is all that is meant. . . .
>
> "Now this is enough for this, and Mr. Coombs don't see—can't be made to see—that either this is a provision which your Honor can't wipe out by your decree, which any omission in your decree will fail—cannot dissolve, or destroy, in which case he will get the benefit of it, or else it is nothing. It is a provision for the benefit of the present company and *which is extinguished by the sale.*"

It is submitted that one may not so fire upon a man, for that if he is missed he is not hurt and if he is killed that closes his mouth.

And it is further submitted that a more imperative case for intervention could not possibly be stated.

Under this argument of Judge Hoadley, the greatest practical danger threatens the appellants' interests.

The decrees taken in pursuance of the argument purport to sell everything except the rights reserved to the United States. The appellants will, if necessary, invoke the reservation by which "all the rights of the complainants, the United States, not disposed of by this decree are hereby reserved to them," for the preservation of the rights herein claimed.

This puts Judge Hoadley himself in a dilemma.

He makes it necessary for us to submit that the position taken by the United States is lacking in both political and financial honesty. He is serving his Government too well. He considers only the price.

Yet the Court, in answer to the request of the appellants for leave to intervene for the protection of their rights as citizens of the Republic, said:

> "There is another ground upon which intervention is sought. It is that these petitioners are members of the public, and that they have the right to intervene for the purpose of protecting the interests of the citizens of the Republic, but the answer to that is that the United Sates, by the officer upon whom the duty is imposed of protecting in this litigation the interests of all the citizens, is prosecuting one and defending the other of the suits of foreclosure. As a member of the public, neither of the petitioners has an interest different in kind from that of every other member of the public resident in the same locality, and upon well settled principles they are not entitled to intervene upon this ground."

Always reserving that the appellants do present a right and interest here other and different from that which might be asserted by most of the citizens, it is added that Judge Hoadley himself practically disclaimed that he was protecting the appellants even while he insisted that they should not be allowed to protect them-

selves. He certainly was not defending nor protecting any rights or interests in the premises not strictly due to the United States as such.

Judge Hoadley had made a trade for the Government, by which the Government secured a bid of forty-six millions for its interests in the road, and he did not want to burden the property with all the organic servitudes imposed upon it for the use and benefit of the people. The Government might lose the bid and the sale.

He feared that if the President or the Court should allow the appellants to continue their road to a connection with the Union Pacific at Columbus or North Platte on the terms which the appellants urged and to which, for the section they represent, they claim to be entitled, then other servitudes might be imposed and the proposed bidders might withdraw.

He accordingly voiced the Government's interpretation of the law, that the appellants had nothing but a right to a physical connection under the laws of Nebraska or, possibly, he included Section 5257 of the Revised Statutes.

It is thought that this statement does him no injustice and that he will not object to a quotation from the hearing:

> Mr. Coombs: "The Judge (Hoadley) does not think it a good thing for the United States to have anything to do with the railroad anyway."
>
> Mr. Hoadley: "Right you are." . . .
>
> Mr. Coombs: "I say he is so anxious for the United States to get rid of it that he doesn't care what becomes of it."
>
> Mr. Hoadley: "Provided its value is paid into the United States under existing laws; yes, sir."

But it is submitted that there is answer to this.

There is a liberty of the people to apply to the President, a right in them to have his judgment, and power to have it enforced in court, all bought by and for and paid for by the people. *These—their liberties, rights, and powers, and others like them secured to the people—are not treasury assets;* they are not for sale at public auction—not to anybody, even an alien corporation, if it would bid the most.

The obligations and servitudes imposed upon the property that secure these are not due to the United States as such, but to the contrary and if necessary to the monetary loss of the United States. They are due to *these appellants* and to others who, as the appellants in fact, *may have made even vast expenditures in reliance upon these obligations and servitudes and in the enterprise which such promised benefits invited.* (No. 233, p. 149-151; No. 234, p. 159-161; No. 235, p. 153-155.)

> "The rights of every man end where the rights of any other man begin."

Let the United States sell, if they can and will, what belongs to the United States *as such;* let them not enhance the price by adding something which does not belong to them but to the appellants.

Beyond the price of that which pertains to the United States *as such,* the money consideration is no more the concern of the court which fixed the bid than it was of the executive that secured it, and it was no concern of either. The question is broader than the mere collection of a debt.

U. S. v. *Union Pacific Ry.*, 160 U. S., 1.

This must be the law. But still the danger threatens:

These appellants feared and submitted to the Court that the power vested in the President of the United States to fix the place at which, and to prescribe the "just and equitable terms" upon which, another railroad may join the Pacific road, might be terminated by a voluntary foreclosure sale in behalf of the United States. This capacity in the President might be construed as a power in him, as agent, coupled with an interest in the United States as his principal. In which view such power, if continued after voluntary sale, might be a mere judicial function which may not be exercised by the chief executive as such.

The appellants also feared that if they were not to intervene, a purchaser might claim the protection of bona fide purchase because of his ignorance of the fact that anybody wanted to avail of the right to connect under the law.

While it is asserted by the appellants that the power conferred upon the President, under Section 15 of the Act of 1862, was coupled with an interest in the people and not solely in the United States as such, and should and was intended to survive the payment and discharge of the financial obligations due by the companies to the United States, it is nevertheless feared that, by a voluntary sale on the part of the United States of all its interests, the appellants' tribunal would go with the rest.

At least, as the appellants submit, if the law officers of the Government sell the property under an interpretation and construction of the law to the effect that such powers as those upon which the appellants must rely are no longer retained, it is possible that no President of the United States would ever subject himself to the suspicion or accusation of bad faith to the purchaser which would

be urged upon any attempt by any President afterwards to exercise those powers.

This is practically conclusive that the rights of the appellants to have the powers exercised will be destroyed, since it is thought that mandamus lies from no court to the President of the United States.

Even if the appellants have the right to connection which they assert, and even if as a matter of law such rights would survive the sales, the power of the sole arbiter to determine and award the right will have been lost. On this it is submitted as cardinal that if any court deprives a suitor of the only other tribunal in which his right and interests may be determined, that court is in duty bound itself to hear and determine the right.

The application of this to the case at bar is self-evident.

To this intervention, every interest known to the appellants was made a party. This included all the mortgagees, the defendant company, and the Reorganization-Committee which afterwards actually purchased the properties, and to those parties the claim of the appellants was, therefore, made known. They bid with full notice. No injustice will be done to them, therefore, if any rights to which the appellants may be entitled be herein protected and enforced.

Tennessee v. *Quintard*, 80 Fed. Rep., 829.

The Place and Terms of the Connection Sought by the Appellants.

Very likely this appellate tribunal would not undertake to fix the place at which or the just and equitable

terms upon which the appellants might build to a connection with the Union Pacific.

Possibly the most this Court will ever do in that event will be to remand the case to the Circuit Court for such determination.

Nevertheless it is thought that this Court might like to know something of the reasons which make the appellants strenuous for a *business* connection on just and equitable terms instead of a mere *mechanical* union.

To understand this, some reference must be made to the history of the road and its sectional influences.

The Pacific Railroad acts contemplated the construction of but *one* railroad from the Missouri River to the Pacific Ocean, but that to secure equal and impartial benefit thereof to the various sections of the whole country, it was provided that the main line should terminate in the east on the one hundredth meridian, whence, diverging in three branches, it should rest for a base on the north and south trend of the Missouri River between Kansas City and Sioux City.

This stretch of the river was foreseen to be, and for imperative natural reasons, as well as by the Acts, it is and always will be a base line, not only for direct, but the principal one for all divergent and convergent, transcontinental or nearly transcontinental transportation.

The Sioux City branch, projected from the original initial point of the main line of the Union Pacific, would pass through Minneapolis and St. Paul to the nearest lake navigation at Duluth. It was intended to accommodate the Middle Northwestern country and the Lake traffic.

The Kansas branch in like manner projected would fall at New Orleans, and the Omaha branch extended would pass between the Lakes and the Ohio River or the Alleghenies. The comprehensive scheme was recognized by the Supreme Court in:

Union Pacific R. R. Co. v. *Hall*, 91 U. S., 343.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.
U. S. v. *Stanford*, 161 U. S., 412.

The plan was somewhat modified in the Act of July 2, 1864, but the natural facts on which it rested and the wisdom of it were not.

By palpable misrepresentations made to the Government, such misdirection and mislocation of the Sioux City branch was made that for the most part it ran away from rather than toward the Pacific.

The branch, as built, has always militated, and its energies have ever been exerted, against the purpose for which it was designed, and with a result in railroad development of unparalleled adversity to the Middle Northwest and to Sioux City in particular.

The wrong was flagrant and notorious. It has been the subject of much debate in Congress. No commission or committee's report has failed to notice it. The railroad commissioner's annual and special reports have frequently referred to it. The legislatures of the Middle Northwestern States protested at the time. The commercial and other associations in cities and towns of Wisconsin, Minnesota, the two Dakotas, Nebraska and Iowa have petitioned the Congress for relief from it in pending legislation. The railroad properties of the appellants were intended to correct it. They were aided not merely in the customary donations and rights of way, but by

public taxation in Sioux City alone to the amount of over three hundred thousand dollars.

All the just and equitable terms which the petitioners asked for the connection to which they were entitled under Section 15 of the Act of July 1, 1862, were those intended to be secured to the Sioux City branch as well as to the other branches under Section 15 of the Acts of 1864.

> "Sect. 15. And be it further enacted, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, *so far as the public* and the government are concerned, *as one continuous line;* and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation without any discrimination of any kind in favor of the road *or business* of any or either of said companies, or adverse to the road *or business* of any or either of the others."

The urgency of the request is extreme. The rest of the Union Pacific system is sold, but not the original Sioux City branch. That city and all the Middle Northwest, of which Sioux City is representative in the Acts, their railroads and the systems that center in that city are sold out of even a nominal connection and into a perpetuity of discrimination against them. The discrimination is in the business as well as in the existence of adverse, and the absence of favorable, railroad construction.

By contract between the Union Pacific and a single other large company, all unrouted traffic available to both is exchanged between them to the exclusion of all other roads. Such other company appears to have an equal, if not a dominant, representation on the purchasing Union Pacific Reorganization Committee, so that a renewal of the contract after reorganization is to be expected.

The appellants might pour unlimited business over the Union Pacific without a dollar of return traffic.

No road can live so.

It is submitted that it was in respect of the "*business,*" as well as in the arrangement of time tables, that Section 15 of the Act of July 2, 1864, and Section 15 of the Act of July 1, 1862, were passed. It was to protect the enterprise and railroads of the Middle Northwest, as well as of the other sections, from unequal oppression.

It is the *business* and its demands, the capacities and facilities for it, that the President of the United States would take into account in determining the *just and equitable terms* on which the Middle Northwest should have its connection.

It was the disposition of the vast influence of the most potent developing agent on the continent which it was thought should be entrusted only to the President of the whole country, so that this provision for the general welfare might be enjoyed on just and equitable terms and impartially by every section seeking connection with the system, and it was not intended that the greatest public-aided enterprise of any time should be diverted from its purpose to become tributary to a single corporation.

U. S. v. *Stanford*, 161 U. S., 412.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.

At least it is the right of the appellants so to urge and to be heard by some tribunal with jurisdiction to determine.

It is repeated that the statement of the Circuit Court does not sufficiently express the importance to the appellants of the connection sought. The appellants have rail-

road, bridge and terminal properties in and entering Sioux City and large stock yards and packing plants which draw their supplies from all the territory occupied by the Pacific railroads. All these cost about ten millions, and the transportation properties were designed, acquired and constructed to accommodate and all depend upon some southwestern and transcontinental railroad connection.

Judge Dillon at the hearing himself stated it well; doubtless from his memory of that former time. He said:

> "This was one great transcontinental line projected through hostile Indian tribes over wildernesses and mountains. If it was ever to be built it was not dreamed of that it would be paralleled ever or in a remote time. The whole scheme shows you that it was thought if Congress thus crossed the deserts and the mountains with this line, that those through the well-settled portions of the country would converge to it, and so it provides for a connection of all these branches and a continuous operation, and it provides, so far as the companies which composed the Pacific family are concerned, those which are subsidized, the Kansas branch and the Central branch and the Sioux City branch, that there shall be no discrimination between them, but that provision is limited to the members of the Pacific family. This has become unimportant now because this provision against discrimination in this section of the Pacific Railroad, against discrimination among the members of the family is no more than the general provisions of the Interstate Commerce Act. Ceased to be of any particular value."

If they thought so why not incorporate it in the decree? It was all the appellants asked.

The "Pacific family" is broken up by this sale, but the Union isn't. The simile is unhappy—the members of that family were never pacific, but in the breaking up of

the family Sioux City and the Middle Northwest have not lost their inheritance in the public enterprise and they wish to retain it.

The Interstate Commerce Law is no substitute or equivalent. The physical difficulties in the way of transcontinental construction so graphically described by Judge Dillon still exist. Another parallel line is not to be thought of, and the discrimination against equal benefit in this one for the section represented by these petitioners has been continually aggravating.

The appellants seek some tribunal with discretion and power to terminate it.

Whether the President would accord the terms which the appellants seek is, of course, uncertain, but the appellants have a right to ask him or to ask any Court which takes away their right to ask him.

The appellants entertain the view that the control of the United States over these roads was intended to be *perpetual*, so that its objects might be served *always* and survive a settlement of the debt.

The appellants do not believe that the roads can be sold to strangers free from such control.

They do not believe that it was contemplated that the roads should be sold at all in foreclosure proceedings.

If the appellants may not otherwise preserve their rights, they deny that there has been, in fact, any authorized sale of the road.

Nevertheless, the sale under the order of the Circuit Court has been had, and, while it stands, any application

to the President to interfere would, for reasons hereinbefore stated, be idle. Certain rights, it is true, were reserved to the United States, but whether as such only or intended to be inclusive of the rights of the appellants is thought to be uncertain.

Still it is submitted that the appellants do not lose their right because of the inability of the parties to reach the terms of agreement in the manner contemplated by law, and that in such contingency the Court itself, having the controversy and the parties before it, will go on and decide the matter, and that the Court will do this on intervention.

Joy v. *St. Louis*, 138, U. S., 1.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 50-1.

Some Further Consideration of Authorities as to Intervention and the Maintenance of the Appeal.

On this question of right and interest, the appellants submit that they are somewhat sustained by the special legislation of Congress in respect of these roads.

Section 10 of the Thurman Act (Act of May 7, 1878) provides as follows:

> "Sect. 10. That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceedings against the several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceedings already commenced, or that may be hereafter commenced against any of said companies, either alone or with other parties, in respect of matters arising

under this act, or under the acts or rights hereinbefore mentioned or referred to, *it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.*

This section, in spirit, certainly covers intervention on a claim of right and interest, because it eliminates all objection on account of multifarousness, which is perhaps the only ground for a discretionary denial of intervention.

With multifariousness and joinder of parties eliminated as objections, the only grounds on which intervention can be refused is either a denial of any right or interest as matter of law or the suggestion of another remedy.

Intervention was sustained in *Tennessee* v. *Quintard*, 80 F. R., 829, for the reason that "no other method has been suggested by which the State could have asserted or secured an adjudication of its rights."

Congress has otherwise been liberal in its special provision for the elimination of technical objections in suits respecting the Pacific railroads. It was so in the Act of March 3, 1873.

This Court has in like manner sustained the rights and interests of citizens in the Pacific roads with disregard for technicalities largely.

Union Pacific R. R. Co. v. *Hall*, 91 U. S., 343.

And finally it may be suggested that the relation of the people to this property is such that no federal tribunal, sensible of the genius of our people and their institutions, would much entertain a technical objection to

the rights of any of the people, at least to be heard, where they thought and asserted that their interests were involved.

Coming more directly to precedent, the appellants refer to a case already cited as authority for carrying intervention further than is asked in this case.

Joy v. *St. Louis*, 138 U. S., 1.

The issue of the appeal in this case seems to have been between two interveners. There was a contract between the city and a foreclosed railroad company, by which other railroads entering the city should have a right to connect with and run into the union station over the tracks of the foreclosed company. After foreclosure sale, and after confirmation, and when nothing remained but to pass the deeds, an intervention was admitted to secure such connection in behalf of another railroad company. The purchaser at foreclosure was also admitted on intervention and said that the obligation of the contract was not a servitude running with the railroad of the foreclosed company, but was a mere contract which had been terminated by the sale.

The Court said, in substance, that it was not necessary to determine whether the right to connect and use was a servitude running with the property, or a contract; it survived the sale. The purchaser further objected that if it did so survive the contract provided that the terms of such connection and use were to be agreed upon between the two companies and that they had not so agreed. To which, again, the Court replied that it was clear they never would agree and that, as the purchaser had denied the right, which right the Court had jurisdiction to determine, and as the parties were before the Court,

the Court would itself go on and fix the terms, and the court did so.

If in that case it was the foreclosed company and not its assigns which had to agree with any other company as to the terms of the connection and the use, then that case was almost identical with the one at bar. Then, in that case, one party whose concurrence as to the terms was essential had ceased, by the sale, to have any interest; just as the United States and their President, it is contended, will, on like event in this case, cease to have any interest.

If that case was not identical with this one in that respect, and it does not appear that it was, then the Court entertained the interventions of the conflicting interests and settled them even after sale, and though it was clear that in that case the connecting road could have enforced its rights in a subsequent original suit.

> "The right of intervention is bottomed upon interest in the subject matter of the controversy."
>
> Jenkins, J., *Farmers' L. & Tr. Co.* v. *Chicago & N. P. R. Co.*, 68 F. R., 412, 418.

An "interest in some branch of the cause."

> Bradley, J., *Williams* v. *Morgan*, 111 U. S., 684.
>
> McKenna, J., *So. Pacific Co.* v. *Board of R. Com'rs*, 71 F. R., 437, 439 40.

> "Even a contingent right to property or a fund which is the subject of an equitable action."
>
> *Peter* v. *Farrel, etc., Co.*, (Oh.) 42 N E., 690, 697.

In *Southern Pac. Co.* v. *Board of Railroad Com'rs, ubi supra*, it was held that the Thurman Act gave to the United States Government such a substantial interest in the revenues of the Union and Central Pacific Railroad

companies as to authorize intervention by the government in a proceeding involving the validity of an order made by state railroad commissioners reducing the rates chargeable by one of such companies.

Justice McKenna, then Circuit Judge, said:

"It is objected generally by counsel for the commissioners that no case can be cited which has sustained an action by one not having the legal title. In the Texas case (*Reagan* v. *Trust Co.*, 154 U. S., 362) the complainant was a trustee in a trust deed executed by the railroad company to secure a second series of bonds aggregating over $7,000,000. There was a prior issue of over $7,000,000, secured by a conveyance to others as trustees. The deed, therefore, was only security, and it was a second and a subordinate one besides. In the Ames case, 64 Fed. Rep., 165, the complainants were stockholders only. In *Williams* v. *Morgan*, 111 U. S., 684, the suit was to foreclose a mortgage on a railroad, and the interveners were simply holders of the railroad bonds. In the first two cases the right of complainants to sue was not raised. It was taken for granted. In the last case the right of the interveners was contested, and Justice Bradley, speaking for the court, said, after reciting the facts:

> 'From this recital of the facts in that case it appears that the bondholders were permitted, as Williams and Thomson (also bondholders) were in the present case, to contest the claim sought to be established as prior to the mortgage. The purchaser was not allowed to contest the claim, because he had no right to do so by virtue of any stipulation made either at or before the sale.'

"Then, proceeding, he says:

> 'This, as it seems to me, placed the purchasers in the present case in a very different position from that which Swan occupied in the case cited. But, if we are mistaken in this view, as regards their position as purchasers, there can be no doubt that, as bondholders, they had a right, under the leave of the court (which was given to them, *and which could not*

have been properly refused), to oppose the charges and allowances in question, and to appeal from the order by which they were allowed. We think that the position of Williams and Thomson made them *quasi* parties in the case, and brought them within the reason of the former case decided by this court, in which persons incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interests, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below.'

"The learned justice then quotes a number of cases variously illustrating the principle. The principle announced, therefore, is '*interest in some branch of the cause.*'" (71 F. R., 439-440.)

"If it has the right to regulate fares and freights, as it contends, and which I have expressed a doubt of, the right to urge it is not exclusively in the government. The railroad company may urge it, and no other issue can be changed or the proof of it lightened by the government's absence from the case. With or without it, the complainant must prove its bill. The government has no more power in this court than other suitors. With or without the aid of complainant, it must prove its bill." (71 F. R., 440.)

As to the interest or right that a party should have to entitle him to intervene, the Supreme Court of Ohio lay it down broadly as follows:

> "*Whenever a party shows even a contingent right to property or a fund which is the subject of an equitable action, he should be accorded a hearing for its protection. An unyielding principle of natural justice accords him this right.*"
>
> *Peter* v. *Farrel, etc., Co.*, 42 N. E. R., 690, 697 (Ohio).

The appellants had an "interest in the subject matter of the controversy." They had an "interest in some branch of the cause." They had at least "a contingent

right to property or a fund which is the subject of an equitable action." "The ends of justice would be subserved by it" (intervention).

Further, if the government holds and in this suit is representing these liberties as trustee for the appellants, then are the appellants *quasi* parties and entitled to be heard in their own behalf; since the interest of the government in this suit as it is conducted is *avowedly hostile* to the appellants' rights. The government will not save these liberties of the public; for that would lessen the price. In this suit the government is avowedly looking for dollars for its treasury, and not for the preservation of servitudes for its people.

These are hostile interests. The agents of the government have attempted to trade appellants' rights away and now move in accord with other parties to the suit to carry out that trade. This avowed hostility of the government entitled the appellants to be heard in their own behalf.

Williams v. *Morgan*, 111 U. S., 684.

The Court of Appeals dismissed the appeals on the ground that the order was not appealable for two reasons: (a), that the order "rested in the sound discretion of the chancellor;" and (b), that the order was not a final order. (Rec. No. 233, p. 181; 91 F. R., 570.)

I.

On the alleged ground that the appeal is an attempt to control the discretion of the Circuit Court:

The answer to this objection is:

(a)

THAT THE DECREE APPEALED FROM SHOWS UPON ITS FACE THAT THE CIRCUIT COURT REFUSED TO EXERCISE DISCRETION AND ADJUDICATED UPON THE MERITS AND LAW QUESTIONS, AND THE DECISION THEREFORE PRESENTS QUESTIONS OF LAW REVIEWABLE ON APPEAL.

The assailed order reads (R., p. 153, of No. 233): "Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, *not as a matter of discretion*, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a *legal right* to intervene, and upon prayer of the petitioners an appeal to the Circuit Court of Appeals is allowed."

This language is so clear and emphatic as to leave nothing for this Court to do but to accept the veracity of the Circuit Court or else to deny that Court's power to determine the matter save "in sound discretion" while expressly not so deciding. The matter was heard practically as a demurrer. Appellees even introduced evidence which it was agreed they might again use on appeal and so the order was left silent as to the evidence introduced. For three days the *merits* were fully and broadly presented and resisted. Surely to admit and then on motion or demurrer to dismiss the appellants would not change the real facts. The trial was upon an oral demurrer in effect. The Court invited a three days argument to test the legal merits. The Court assumed *on the record* to settle and determine "*a legal right*" *on the merits* and "*not as a matter of discretion.*" Appellants relied thereon.

The brief of appellees in the Circuit Court of Appeals clearly showed that appellants were defeated in the Circuit Court on a consideration of the merits, for their argu-

ments in that Court, which we assume will be repeated in this Court, were grounded upon quotations from the opinion of Judge Sanborn printed in full at the opening of this brief. The "essence" of what the Circuit Court did is abundantly manifest, and to forestall all doubt or mistake the Court made the record reject "discretion," decide "legal rights" and allow an appeal.

The same question has arisen in various forms of proceeding, as, for example, applications for *certiorari*, motions and petitions for new trials, motions to quash indictments, certificates of division between Judges of the Circuit Court on motions and petitions for new trials, the general doctrine being that all these rest in the discretion of the Court and therefore present no question for the appellate court. But the exception and distinction upon which we rely has been often and clearly pointed out in all of these various forms of proceedings.

In *Pittsfield Natl. Bank* v. *Bayne*, 140 N. Y., 321, 328, Peckham, J., said:

> "The counsel for the receiver maintains that the order is not appealable to this Court, for the reason that it was a discretionary one with the general term. If this be true, we cannot review the exercise of that discretion, *unless in case of an abuse thereof*, which does not appear. In one aspect the action of the Court is discretionary. It is not legally bound to act when its action is invoked by a mere motion or application for an order of restitution. It may deny that mode of relief and turn the party over to his action. If, however, it retain the application, it must decide upon the facts which are presented to it, and if they show a legal right to demand restitution, and a legal right to the full sum demanded, I apprehend there is then no discretion with the Court to refuse to grant any relief or to grant but a portion of the relief demanded. . . . If the application be wholly denied, and *nothing further appear in the order*, it may very

possibly be that the denial would be regarded as an exercise of discretion vested in the Court, whether to entertain such application or not, and the order of denial might not be appealable. When, however, the application is entertained, and an order for restitution in part is made, if, as a matter of law, the applicant is entitled to restitution of the whole, then the order which refuses it is appealable here." (53 N. E., 632.)

So where, although the Court dismissed the application without passing upon its merits, the order of judgment or dismissal shows upon its face that it was not rendered in exercise of the discretion of the Court, but in a mistaken view of the law as to its jurisdiction or power, it is the proper duty of the appellate court to reverse that decree of dismissal.

Story, J., *Steamboat New England*, 18 Fed. Cas. 53, 56-57.

The same question has also arisen on the right of the judges of the Circuit Court to certify a division of opinion, on a motion for a new trial to the Supreme Court of the United States, the general doctrine being that there can be no such certificate, as such motion usually rests in the discretion of the Court, and therefore presents no question for the determination of the Supreme Court.

United States v. *Rosenberg*, 7 Wall., 580.

But it has been decided by this Court that where on a motion for a new trial a question arises not determinable in the discretion of the Court, that question may be certified to the Supreme Court for its opinion.

United States v. *Thomas*, 151 U. S , 577, 581.

In the case last cited, on a motion for a new trial, there arose a question whether the land on which the murder was committed was within the jurisdiction of the

Federal Courts; and on a certificate of division between the judges of the Circuit Court that question was certified to the Supreme Court.

Fuller, C. J., said:

"It is the general doctrine that there can be no certificate of a division of opinion between the judges of the Circuit Court on a motion for a new trial, as such motion usually rests in the discretion of the Court, and, therefore, properly presents no question for our determination. *United States* v. *Rosenberg*, 7 Wall., 580. But such is not always the case. Sometimes a motion of the kind or of a similar kind may present for consideration a question going directly to the merits, and a decision of which may determine the point in controversy. In such instances the Court will consider the question submitted on a certificate of division between the judges of the court below. Thus in *United States* v. *Wilson*, 7 Pet., 160, the question arose between the judges of the Circuit Court whether a person convicted of a capital offense, who had received a pardon, could derive any advantage from it without bringing the same judicially before the court by bill, motion or otherwise. Upon this question the judges were opposed in opinion, and it was stated under their direction and certified to this Court and we considered and decided. The Court regarded the motion as one going to the merits of the case, having a direct bearing upon the punishment to be imposed, and *not a question determinable in the discretion of the court*, and held that it could properly consider the question upon a certificate of division of opinion of the judges of the Circuit Court. Holding, therefore, that we can consider the question certified, disregarding the irrelevant matter accompanying the certificate, we proceed to its examination." (151 U. S., 581.)

In *Mattox* v. *United States*, 146 U. S., 140, judgment of death was rendered against Mattox for murder. In support of his motion for a new trial certain affidavits

"were offered in open court by the defendant. . . . and by the said district court excluded; to which ruling the defendant, by his counsel, then and there excepted and still excepts." And the defendant excepted to the overruling of his motion for a new trial. The judgment was reversed with directions to grant a new trial.

Fuller, C. J., said:

> "The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error (cases), but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of the admissibility thereby preserved."

In *Haws* v. *Vic. Copper Min. Co.*, 160 U. S., 303, 313, the doctrine with its limitataions is thus stated by Mr. Justice White:

> "The contention that the trial court did not consider the affidavit as to the newly discovered evidence presented for the purpose of obtaining a new trial, is answered by the order refusing a new trial, which recites 'that it was heard upon the record and statement and upon the affidavits filed by the defendants in support of their motion.' This takes the case entirely out of the principle announced in *Mattox* v. *United States*, 146 U. S., 140 (39: 917). *That case involved a refusal to exercise discretion*, whilst the contention here amounts to the assertion of a right to control a discretion when it has been lawfully exercised." (160 U. S., 313.)

In the foregoing we have assumed that the dismissal of the petition of intervention was a matter within the discretion of the Circuit Court, if that Court had so chosen to regard it and act upon it. But a further answer to the question is—

(b)

THAT ON THE FACTS SET FORTH IN THE PETITION ITS DENIAL WAS NOT A MATTER OF DISCRETION.

There are undoubtedly numerous instances in which the granting or denial of an application to intervene *pro interesse suo* is a matter resting in the sound discretion of the court to whom the application is addressed, and from which no appeal or writ of error will lie. But it is respectfully submitted that there are instances, on the other hand, where the right of intervention *pro interesse suo* is from necessity well nigh absolute, and its refusal may be assigned as error. If a party *must* protect his rights in that suit and by intervention, then it must follow that he has a right to intervene.

An illustration may be found in the case of *Freeman* v. *Howe*, 24 How., 460, and subsequent decisions along the same line. In an action against one party the property of another was taken on attachment by the marshal. The Supreme Court of Massachusetts were unanimously of the opinion that the owner could retake the property from the possession of the marshal, because he could not intervene in the action in the Federal Court. But on writ of error to this Court it was held not only that he could intervene in the action in the Federal Court, but that he must if he wanted to secure a return of his property. Well, if he must, then of necessity he has the right; otherwise it lies in the power of the court to deprive a party of property and of justice in the exercise of a mere discretion. That cannot be.

In *Gregory* v. *Pike* (C. C. A. 1st), 67 F. R., 837, 846, the Court of Appeals for the First Circuit, Putnam, J., delivering the opinion, speak of the right of a party to intervene *pro interesse suo* as absolute under the authority of the

decisions of the Supreme Court of the United States. And in that case, as the party had improperly been made defendant and filed a cross-bill, the cross-bill was treated by the court as a petition of intervention *pro interesse suo.*

In *Tenn.* v. *Quintard* (C. C. A. 6th), 80 F. R., 829, 835, an appeal from the dismissal of a petition of intervention was sustained, although the petition was dismissed without passing upon the merits and on the ground that the petition was filed too late. The Court of Appeals say:

> "No other method has been suggested by which the State could have asserted or secured an adjudication of its rights. It is certain that if the State had rested until a confirmation of the sale and payment of the purchase price, and certainly after the property might have passed into the hands of innocent holders, great difficulty would have been found in maintaining its rights, if any, under these contracts. We are clear that the petition was properly and seasonably filed." (80 F. R., 835.)

But a still further and perhaps a more satisfactory answer to the objection is—

(c)

That the decree of dismissal not only shows upon its face that the Circuit Court refused to exercise discretion, but that the Court did, in fact, adjudicate upon the rights of the petitioner, and this adjudication, unless appealed from, would be *res adjudicata* in any other or subsequent proceeding.

The Court surely cannot deprive a party of his rights in the exercise of a mere discretion and without his ever having had a day in court.

And it is important to notice that the discretion which a court exercises on such applications is simply

this: whether it will hear and determine his rights in that proceeding, or whether it will remit him to some other and perhaps more appropriate proceeding.

That this is the discretion which the court exercises was clearly pointed out by Sir James Wigram, V. C., who had occasion in *Empringham* v. *Short*, 3 Hare, 461, to investigate the practice of the court in trying the rights of parties claiming property in the possession of sequestrators, and reached the conclusion that in such cases the court exercised a discretion. He said:

> "Where the case has been considered to admit of no doubt, the court has determined it without further inquiry. In some cases the court has ordered the parties to bring an ejectment; in other cases, where the sequestrator has found a person in possession of property, the court has ordered a writ of assistance to issue, unless the party stipulated to come in and be examined *pro interesse suo. The Court sees what is necessary to be done in order to try a question of right, and it then puts it in the way of trial.*" (3 Hare, 470.)

The same fact is pointed out even more clearly and pointedly by Peckham, J., in *Pittsfield Nat'l Bank* v. *Bayne*, 140 N. Y., 321. He says:

> "In one aspect the action of the Court is discretionary. It is not legally bound to act when its action is invoked by a mere motion or application for an order of restitution. It may deny *that mode of relief* and turn the party over to his action. If, however, it retain the application, it must decide upon the facts which are presented to it, and if they show a legal right to restitution, and a legal right to the full sum demanded, I apprehend there is then no discretion with the Court to refuse to grant any relief, or to grant but a portion of the relief demanded." (140 N. Y., 328.)

It follows, also, we think, that if there is no other action to which the party can be turned over,—if the party must have relief in those proceedings or not at all,—the Court is practically precluded from the exercise of a discretion. And under the last preceding subdivision of this brief we have shown cases where, in the language of Mr. Justice Bradley, leave to intervene "*could not have been properly refused.*"

> *Williams* v. *Morgan*, 111 U. S., 684.
> *Tenn.* v. *Quintard*, 80 F. R., 829, 835.
> *Ante*, subdiv. (*b*) and cases.

So in the case at bar, as appellants sought to save their rights against the then unknown purchaser, there was no other proceeding.

But the point to which we call especial attention is this: When it is said the Court exercises a discretion, that simply means that the Court has a right to say whether it will hear and decide the party's rights in the pending proceeding, or turn him over to his action, if any. *Obviously it cannot do both.* It follows that if the Court would turn a party over to his action, the order of dismissal must not be preceded by a determination upon the merits, and must, in fact, if not so expressed, be without prejudice to his action. In *The Oregon*, 158 U. S., 186, 211, where a party was improperly allowed to intervene and the order of the Circuit Court was reversed by this Court, this Court thought it proper to make an addendum to the decree theretofore entered, to the effect that it should be "without prejudice" to "independent" proceedings by the intervener. If the decree of dismissal is preceded by a determination and denial of the petitioner's rights, his right to resort to his action is cut off and the decree of dismissal is final, and a review of that determin-

ation and denial can only be had on appeal from that decree in that proceeding. It is analogous to the dismissal of a bill in equity. If the Court dismiss the bill without an adjudication upon its merits, and on the ground that the complainant had a plain, adequate and complete remedy at law, the complainant may then avail himself of his remedy at law. But if the dismissal be preceded by a determination and denial of the complainant's rights, then the complainant can no longer resort to his action, and this, too, though the Court might in its discretion have dismissed the bill without an adjudication upon the merits.

There may be this distinction between the dismissal of a bill in equity and that of an intervening petition: the decree of dismissal, according to some authorities, must show on its face that the dismissal of the bill was without prejudice; whereas, in the case of an intervening petition, (in the language of Mr. Justice Peckham), "If the application be wholly denied, and *nothing further appear in the order*, it may very possibly be that the denial would be regarded as an exercise of the discretion vested in the Court, whether to entertain such application or not, and the order of denial might not to be appealable." (140 N. Y., 328.)

But however that may be we need not stop to discuss here; for in the case at bar the order of dismissal, on its face, expressly negatives the exercise of discretion, and shows that it is preceded by a determination and denial of the appellants' rights and proceeds solely from such determination and denial, the order is therefore a final determination of the appellants' rights and appealable within all the authorities. See especially—

People v. *Com'rs, etc., of Brooklyn*, 103 N. Y., 370, and cases.

Further, when property is sequestered in a receivership having in view a sale of the property and a distribution of the proceeds thereof, the right of intervention is not only enlarged, but often made absolute. To relegate a party to an independent action is to trifle with all hope of relief. The purchaser should know whether this easement is organic or destructible by sale. His bid should be honestly invited. Moreover, this purchaser first becomes known in the receivership on foreclosure and at the sale. Our rights are to be saved, not against the old corporation, but against the purchaser, who is known at the sale and not before. The sale creates the purchaser.

It was doubtless a consideration of such necessities as these that led Judge Sanborn to refuse to exercise discretion, if such discretion was open to him, and to dismiss the petition only upon and after a determination and denial of the appellants' rights, and all with the view and purpose of allowing and giving to the appellants an appeal and a review of his determination and denial to the end that the same might be corrected if erroneous, and the appellants awarded relief in these proceedings if found to be so entitled. The intervention was denied by Judge Sanborn under no ordinary tests of intervention. The Court in reality tested the petition as by demurrer on the merits. The appellees even submitted evidence. And the Judge listened to the merits of our contention; for he recognized full well that it was, and should be decided as, a question of rights, and not as one of the place or manner of the assertion thereof. He expressly refused to consider whether we had any action to which we could be remitted, and heard the petition upon the merits and denied our rights. Such determination and denial was final in its nature and appealable.

(d)

The "Ames case," No. 235, was brought on behalf of stockholders and creditors of the Union Pacific Railway Company, and by the very terms of the bill of complaint invited the appellant, also a stockholder and creditor (Rec., 153-4), to come into the case as a party for whose benefit that case was avowedly instituted and prosecuted.

(e)

The "Government case," No. 233, was brought by the United States for the foreclosure of its alleged "subsidy lien." The United States of America also became a party to the "Dexter case," No. 234, brought by the trustees to foreclose an alleged first mortgage on the Union Pacific properties. At the time of the filing of the petition of intervention the "Dexter case," No. 234, and the "Government case," No. 233, were being crowded for final decree. The "Ames case," No. 235, was brought by stockholders and creditors for the appointment of a receiver and the administration of the properties of the Union Pacific Railway Company.

In these two foreclosure cases, Nos. 233 and 234, the "Government case" and the "Dexter case," the United States became a dominant party in Court, avowedly striving for the final decree of foreclosure in each of the cases. The fact that the United States was an actual and active party was thus used against the appellants by the Circuit Court: "There is another ground upon which intervention is sought. It is that these petitioners are members of the public and that they have the right to intervene for the purpose of protecting the interest of the citizens of the Republic. But the answer to that is that the United States by the officer upon whom the duty

is imposed of protecting *in this litigation* the interest of all the citizens *is prosecuting one and defending the other* of the suits for foreclosure."

Inasmuch as the position of the Government in this litigation has been hostile to the rights and interests of the appellants, avowedly so, an exception should be made under which appellants might appear in their own behalf; but we have made the above quotation from the opinion of the Circuit Court for another reason, namely, that the presence of the sovereign government, the United States of America, in these important cases as an active party to the record, made it possible for the appellants to assert their rights in these cases by intervention, and made it practically if not legally impossible for them to assert their rights elsewhere. The United States of America cannot be compelled to become a party complainant or respondent to any litigation. The sovereign cannot thus be compelled to litigate its claims or its rights, and it may safely remain out of Court and silent. But when the United States becomes a party complainant or respondent of record in Court proceedings, it must abide by the same rules and procedure as the other parties to the record to which it has voluntarily submitted itself. The appellants could not, by independent action or otherwise, *compel* the United States to litigate with them the claims herein asserted by them and herein denied by the United States. Because, therefore, of the helplessness of process against the unwilling United States in an independent action, the appellants were practically limited to intervention in these suits to which the United States has voluntarily submitted itself, and intervention thus furnished practically, if not actually, the sole opportunity for the assertion, protection and reservation of the rights and interests of the appellants sought to be desfroyed in

these suits, not more by the bondholding trustees than by the United States itself.

The United States is a persistent party to each of the three cases resisting the intervention and is seeking to evade a consideration of the merits on appeal. (No. 233, pp. 152, 162, 173-4; No. 234, pp. 163, 174, 186-7; No. 235, pp. 157, 169, 170.)

The United States seeks foreclosure to the extinguishment of appellants' rights and servitude. If successful in excluding appellants from intervention, the government cannot be compelled to respond to any independent suit. These liberties of the people should be regarded as above mere technicalities, and the Court should from impulse invite consideration of them.

This consideration practically relieves the order of discretion, and clothes it with essential finality. To hold the order an abuse of discretion even would sustain the appeals.

(f)

The property of the Union Pacific, when this intervention was sought, was in the possession of the receiver of the Federal Court, which made that case (No. 235), the necessary one in which to seek intervention. The trade between the interested parties and the government was made with reference to these three cases, and the sale was sought by all the parties, a sale which Judge Hoadley said to the Court would extinguish all the appellants' rights. It was in these cases that the purchaser through foreclosure sale was to be created, there only was he to be known, and it was against the purchaser so to be created by the sale that appellants desired to preserve and

protect the organic servitude in their behalf,—to preserve the right to a "business" connection.

The very purpose of this sequestration was avowedly a final disposition of all rights, title and assets as completely as though the same constituted a mere fund in Court.

> *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S., 207.

"To constitute a final judgment, it is not essential that it should be a bar to another suit."

> *Colorado Eastern Ruy. Co.* v. *U. P. Ruy. Co.*, 94 Fed. Rep., 312.

(g)

The Circuit Court of Appeals in wholly refusing to consider the merits of the appeals concurred in the statement that

> "The action of the lower Court in refusing leave to intervene is not receivable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention."

Even if it should be conceded, which it is not, that the order rested in the sound discretion of the Circuit Court, still in the very nature of things, that sound discretion is a *judicial* discretion that may be abused, and is, therefore, reviewable on appeal. As this Court has said *in re* Farmers Loan & Trust Company, 129 U. S., 206:

> "The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judical

discretion, and the very point to be decided upon an appeal here is whether they have such discretion, and whether they exercised it in a manner that cannot be reviewed in this Court. The question is one which in its nature must be a subject of appeal."

II.

On the alleged ground that the appellant is not a party to the suit and so could not appeal from a decree therein:

If the petition of intervention had been denied as a matter of discretion and an appeal had accordingly been refused, and this had been an application for mandamus to compel the Court below to allow an appeal, it may be that mandamus would have been refused.

Ex parte Cutting, 94 U. S., 22.

But that is not this case. The decree expressly negatives discretion and adjudicates upon the rights of the appellants; and although the result of the decision was to dismiss the petition, nevertheless their appeal was allowed and the appellants were to that extent, at least, recognized as parties to the suit.

This same objection was raised and answered in—

Rust v. *United Waterworks Co.* (C. C. A. 8th), 70 F. R., 129, 132-3.
Voorhees v. *Mfg. Co.* (Ind.), 39 N. E., 739.

See also as to appeal—

Tenn. v. *Quintard*, 80 F. R., 829, 835.
Williams v. *Morgan*, 111 U. S., 684.

In *Rust* v. *United Waterworks Co.*, *ubi supra*, the receiver of a corporation against which a judgment had been rendered, by petition to intervene asked to have the

judgment against the corporation opened and for leave to come in and defend the action. From the judgment denying such petition a writ of error was taken to the Court of Appeals, and the defendant in error moved to dismiss that writ of error on the ground, among others, that the plaintiff in error was not a party to the action in which the judgment was rendered against the company and therefore was not entitled to a writ of error to review that judgment.

The Court of Appeals, after reciting this objection, say:

> "But the plaintiff in error was a party *to his own petition* for the vacation of that judgment, and for leave to defend that suit, and the judgment which finally denied him any of that relief. It is the latter judgment which he seeks to review, and that he is entitled to have reviewed by this Court through this writ." (70 F. R., 132-3.)

In *Voorhees* v. *Mfg. Co., ubi supra*, the Supreme Court of Indiana say:

> "It is objected to the right of appeal from the order denying the petition that such petitioner, the rolling mill, was not a party to the action of Voorhees and the appointment of the receiver, because the Court had refused to make it such in the denial of the petition, and hence, being a stranger to the record, it could not appeal. But this contention is based on a misconception of what it is that the rolling mill was appealing from. The record clearly shows that it was not appealing or trying to appeal from Voorhees' judgment against the car company. If it had so appealed, or tried so to appeal, its efforts should have been properly met by a dismissal of such appeal or attempted appeal. It also clearly appears that the rolling mill was not appealing, or attempting to appeal, from the order appointing the receiver. Such an appeal would have been equally unavailing. But the rolling mill was appealing from the action of

the special term on its petition asking to be allowed to intervene in the proceedings resulting in the appointment of the receiver for the alleged purpose of better protecting the interests of itself, a creditor of the car company, together with all other general creditors of the insolvent car company. It can hardly be said that the car company was not a party to its own petition of intervention, or that it was not a party to the order of the special term denying its petition. It was a party to the petition, and order thereon, within the meaning of the law, requiring, as a prerequisite to the right of appeal, that the party invoking such right must be a party to the order or judgment appealed from." (39 N. E., 739-40.)

And even if the petitioner could not appeal from the main decree in the suit, the denial of its petition of intervention, if wrongful, may be made the ground of a reversal of that decree, as was done in

Billings v. *Aspen Min. & Smelt. Co.* (C. C. A. 8th), 51 F. R., 339, 341, 350.

The decree appealed from was one that made a final disposition of the matter presented by the petition and was a final decree.

Rust v. *United Waterworks Co.* (C. C. A. 8th), 70 F. R., 129, 132.
Voorhees v. *Mfg. Co.* (Ind.), 39 N. E., 738, 740.

Respectfully submitted,

JOHN C. COOMBS,

HENRY J. TAYLOR,

Counsel and Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 233.

THE CREDITS COMMUTATION COMPANY AND THE COMBINATION BRIDGE COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees*.

ALSO No. 234. SAME APPELLANTS

v.

F. GORDON DEXTER, ET AL., *Appellees*.

ALSO No. 235. SAME APPELLANTS

v.

OLIVER AMES, SECOND, ET AL., *Appellees*.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS RESISTING MOTIONS TO DISMISS APPEALS OR TO AFFIRM.

STATEMENT.

On the first of this month counsel for the appellants, in each of the above entitled appeals, received by mail appellees' motions in the alternative to dismiss the appeals or to affirm the decree.

Prior to the service of notice of said motion the appellants in each of the above entitled suits had duly filed in this Court their brief of the argument.

Inasmuch as the said brief of appellants upon the merits of the controversies presented by these three appeals covers in the main all the questions presented by these motions to dismiss, we would respectfully ask the Court to consider the said brief of appellants as a brief also in resistance to these several motions. To this should be added the petition itself, a substantial brief under the suggestion of the Circuit Court. Assuming that this request will be granted, and that said petition and brief will be as fully considered upon the issues presented by these several motions of the appellees as though the same had been technically entitled and filed as a brief in resistance thereof, the appellants herewith file this brief in reply to appellees' brief, but only as supplemental to their said original petition and brief heretofore filed, as above stated, upon the merits of these respective appeals.

While each appellant has prosecuted his appeal independently and in form in severalty, as heretofore they may be considered together for convenience, although each appellant desires a declaration of its own rights in the premises.

The appellants contend that they are entitled to a business connection with the Union Pacific Railroad upon "just and equitable terms."

That railroad was built under a series of congressional enactments that made it, as this Court has decided, "*a great national highway* under national control * * * so far as the public and the government were concerned, *as one continuous line.*"

U. S. v. *Stanford*, 161 U. S., 412.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.

In return for vast subsidy aid, the national charter imposed upon this "great national highway" important servitudes. It was not then contemplated that another transcontinental line would, for a remote period, or ever, be built. Therefore, this was made a "continuous line" from the Missouri River to the Pacific Ocean. It was burdened with an organic servitude to accommodate other railroads by business connections with this "great national highway" without unjust discrimination. It was intended to induce railroad building from the east so as to share in the business of this national highway. The entire Pacific congressional legislation proves this, and the decisions of this Court only confirm the fact that this great national highway from the Missouri River to the Pacific Ocean was built for the Republic with due regard for all sections thereof. It was contemplated that many railroads would join it but that none would parallel it and that each and all would be protected and benefited by this actual and business connection. The chief magistrate of the Republic was designated to prescribe the "just and equitable terms" of such business connections, and the servitude was intended to endure forever. While all the Pacific legislation must be considered by the Court, we here quote Section 15 of the Act of July 1, 1862 (12 Stat. at L., 489, 496, Chap. 120):

"Sec. 15. And Be It Further Enacted, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto."

The following decision of this Court comments on this section 15, and also quotes an amendment to it:

"By the 12th section, that 'the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line;' and by the 14th section, that the Union Pacific Railroad Company should construct a single line of railroad and telegraph from the western boundary of Iowa, at a point to be designated by the President, so as to form a connection with that company's line on the said one hundredth meridian of longitude, upon the same terms and conditions prescribed 'for the construction of said railroad and telegraph first mentioned;' and whenever a railroad was constructed through Minnesota or Iowa to Sioux City, then the above company should construct a railroad and telegraph line from Sioux City to connect with the Union Pacific Railroad.

"The 15th section declared that any company then or thereafter incorporated should have the right to connect its road with the road and branches provided by the act, at such places and upon such terms as the President might prescribe. But by an act of congress, passed June 20, 1874 (18 Stat. at L. 111, Chap. 331), the following addition was made to this section of the act of July 1, 1862 (12 Stat. at L. 489, 496, Chap. 120):

> 'And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said com-

panies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding $1,000, and may be imprisoned not less than six months; . . . and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869.' "

U. S. v. *Union Pacific R. Co.*, 160 U. S., 23, 24.

Section 15 of the Act of July 2, 1864, is also pertinent:

"Sec. 15. And Be It Further Enacted, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

I.

EVEN IF THE DECREE OR ORDER APPEALED FROM WAS WITHIN THE DISCRETION OF THE CIRCUIT COURT AND AN EXERCISE THEREOF, AS APPELLEES CONTEND, NEVERTHELESS THE SAME WOULD REMAIN REVIEWABLE ON APPEAL.

If the order rested and was exercised in the discretion of the Circuit Court, such discretion is judicial and

not arbitrary, and the Court may abuse its judicial discretion, and, therefore, the same is reviewable on appeal. As this Court has said, *ex parte Farmers Loan & Trust Company*, 129 U. S., 206:

"The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is whether they have such discretion, and whether they exercised it in a manner that cannot be reviewed in this Court. The question is one which in its nature must be a subject of appeal."

II.

THE DECREE OF THE CIRCUIT COURT OF APPEALS WAS FINAL.

The Circuit Court of Appeals disregarded the merits of the questions involved, and dismissed the appeals upon two grounds: because the decree appealed from was believed to be one made in the discretion of the Circuit Court, and because the same was held to lack finality. From that decree of dismissal of the Circuit Court of Appeals, these appeals to this Court have been taken. In the multitude of counsel for appellees not one has suggested to this Court that said decree of dismissal by the Circuit Court of Appeals was not a final decree. It is manifest that said dismissal possessed all the elements of finality, and, therefore, is reviewable on the merits in this Court on appeal.

III.

THE DECREE OF THE CIRCUIT COURT APPEALED FROM SHOWS UPON ITS FACE THAT THE CIRCUIT COURT REFUSED TO EXERCISE DISCRETION AND DID ADJUDICATE UPON THE MERITS AND LAW QUESTIONS, AND THE DECISION, THEREFORE, PRESENTS QUESTIONS PROPERLY REVIEWABLE ON APPEAL.

The assailed order of the Circuit Court reads:

"Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, *not as a matter of discretion*, but because said petitions *do not state facts* sufficient to show that the petitioners, or either of them, have a *legal right* to intervene, and upon prayer of the petitioners an appeal to the Circuit Court of Appeals is allowed."

This language is so clear and emphatic as to leave nothing for this Court to do but to accept the veracity of the Circuit Court. The matter was heard practically as on demurrer. Appellees even *introduced evidence* which it was agreed they might again use on appeal, and so the order was left silent as to the evidence introduced. For three days *the merits* were fully and broadly presented and resisted. Surely to admit and then on motion or demurrer to dismiss the appellants would not change the real facts—the essence of what was done. The trial was upon an oral demurrer in effect. The Court invited a three days' argument to test *the legal merits*. The Court assumed *on the record* to settle and determine "*a legal right*" *on the merits* and "*not as a matter of discretion*." Appellants relied thereon.

IV.

THE DECREE OF THE CIRCUIT COURT NOT ONLY SHOWS UPON ITS FACE THAT SAID COURT REFUSED TO EXERCISE DISCRETION, BUT ALSO SHOWS THAT SAID COURT DID ADJUDICATE THE RIGHTS OF THE PETITIONERS, BEING THE APPELLANTS HEREIN.

Said Court did hear and determine the legal rights of the appellants. *The assailed decree so declares.* The Circuit Court could not and did not assume to determine the legal rights of the appellants and thereafter to exercise a discretion in turning the petitioners over to some other form of action. *Manifestly the Court could not do both,* and it contented itself with determining the legal rights of the petitioners, and in order to conclude the appellees from the position that said determination was a mere exercise of judicial discretion, the Court expressly negatives the basis of said contention in order that the very essence of what the Circuit Court did might be known to, and reviewed by, the proper appellate tribunals.

Haws v. *Vic. Copper Min. Co.*, 160 U. S., 303, 313.

Pittsfield Nat. Bank v. *Bayne*, 140 N. Y., 321, 328.

Even if the Circuit Court had the choice of a refusal under discretion or a determination upon the merits, said Court did not assume to do both, but on the record refused to dismiss the appellants as a matter of discretion, and did dismiss them as a matter of adjudication upon the merits. Whether the appellants could have

been relegated to an independent action, without an abuse of the Court's discretion, may or may not be here presented to this Court, and is not so presented if our contention is correct that the Circuit Court in its choice entered this decree upon the single chosen basis of an adjudication of the legal right of the petitioners, expressly negativing the exercise of judicial discretion.

People v. *Commissioners*, 103 N. Y., 370.

V.

APPELLANTS WERE INVITED TO BECOME PARTIES.

The Ames case, No. 235, was brought on behalf of the stockholders and creditors of the Union Pacific Railway Company, and by the very terms of the bill of complaint itself *invited* the appellant, also a stockholder and creditor (R., 153-4), to come into the case as a party for whose benefit that case was avowedly instituted and prosecuted. The appellants *accepted* the invitation and should have been permitted to remain in a case where their interests were only *mis*represented and selected for extinguishment.

VI.

ONLY IN THESE SUITS HAD THE GOVERNMENT PERMITTED A LITIGATION OF THESE SERVITUDES AND LIBERTIES.

In the two foreclosure cases, the "Government case," No. 233, and the "Dexter case," No. 234, the United States was already a party litigant, prosecuting one and defending the other of said suits for foreclosure. Inasmuch as the position of the Government has always been hostile

to the rights and interests of these appellants, *avowedly so*, an exception, if necessary, should be made under which appellants might appear in their own behalf, for they had no representatives among existing parties.

The record further shows that the United States of America in these two important foreclosure cases was an active party to the record, seeking the disposition and sale of all these Union Pacific properties, and seeking, if possible, to include therein the right and liberties of the public, including these appellants. As the controversy was not less with the Government than with the other parties in the respective suits, this was not a case in which the petitioners could be relegated to an independent suit without manifest prejudice, if not defeat, of their rights. The United States of America cannot be *compelled* to become a party complainant or respondent to any litigation. The sovereign cannot thus be compelled to litigate its claims or its rights, and it may safely remain out of Court and silent. But when the United States *voluntarily* becomes a party complainant or respondent of record in Court proceedings it must abide by the same rules and procedure as other parties to the record to which it has thus voluntarily submitted itself. The appellants could not by independent action, or otherwise, compel the United States to litigate with them the claims herein asserted by them, and herein denied by the United States. Because, therefore, of the helplessness of process against the unwilling United States in an independent action, the appellants were practically limited to intervention in these very suits to which the United States had thus voluntarily submitted itself, and intervention thus furnished practically, if not actually, the sole opportunity for the reasonable and lawful assertion,

protection and reservation of the rights, interests and liberties of the appellants sought to be destroyed in these suits, not more by the bondholders' trustees than by the United States itself. The United States is a persistent party to each of the three cases resisting the intervention and is seeking to evade a consideration of the merits on appeal. (No. 233, pp. 152, 162, 173-4; No. 234, pp. 163, 174, 186-7; No. 235, pp. 157, 169, 170.)

The United States seeks the extinguishment of appellants' rights and servitude. If successful in excluding appellants from intervention, the Government cannot be compelled to respond to any independent suit. These liberties of the people should be regarded as above mere technicalities, and the Court should from impulse invite consideration of them.

This consideration results in the conclusion that these petitioners had no adequate relief by any other or independent proceedings, and adds to their contention that the assailed order was final in its essence and its practical results.

VII.

THE FEDERAL COURT THROUGH ITS RECEIVERS, POSSESSED THE UNION PACIFIC PROPERTIES.

The properties of the Union Pacific when this intervention was sought were in the possession of the receiver of the said Federal Court for the manifest and express purpose of final disposition under these foreclosure suits. The record shows the trade into which the interested parties and the Government had entered. The sale had been agreed upon, and the Government's counsel said

that sale would extinguish the appellants' rights. It was in these foreclosure cases that the purchaser was to be found, created, first made known, and it was against the purchaser that the appellants desired to preserve and protect the servitude in their behalf—to preserve a right to a business connection with the Union Pacific Railway properties under the congressional legislation to that end, and more particularly under Section 15 of the Act of July 1, 1862, which reads as follows:

"That any other railroad company now incorporated or hereafter to be incorporated shall have the right to connect their road with the road and branches provided for by this act at such places and upon such *just and equitable terms* as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto." See also the amendment to this, quoted *supra* from 160 U. S., 23-4 (18 Stat. at L. 111, Chap. 331.)

VIII.

THE UNITED STATES CANNOT EXCLUDE PARTIES.

The United States asks a dismissal, because it says that it "has never consented that such proceedings be brought against it, but has objected and still does object to the same." The record shows no such objection in the Circuit Court. This objection was never made nor even suggested until the motion in the Circuit Court of Appeals. That is too late. The objection, however, even if made in the Circuit Court, would have been unavailing. As Judge Sanborn says: "The United States is prosecuting one and defending the other of the suits for foreclosure." Having voluntarily made itself a party complainant in suit No. 233 to prosecute one foreclosure, and

a party respondent in No. 234 to defend against another foreclosure, the Government submitted itself to the litigation, and could not use its sovereignty to exclude either parties or issues. In the Circuit Court no such reason was ever given nor even suggested, nor indeed is such a proposition argued in this Court in any of the briefs submitted upon these motions. It may therefore be passed as waived.

The order of Judge Sanborn recognizes the petitioners as parties to their own petition and the determination thereof, and ordered notice "to said parties respondent" to "show cause" (No. 233, p. 141; No. 234, p. 151; No. 235, p. 145), and further recognizes the petitioners as parties by saying in the decree that "upon prayer of the petitioners an appeal to the Circuit Court of Appeals is hereby allowed" (No. 233, pp. 153, 157; No. 234, pp. 163, 168; No. 235, pp. 157, 164), and the respondents are named by Judge Sanborn as the "appellees" in his citation (No. 233, p. 158; No. 234, p. 170; No. 235, p. 165). All the "appellees" to this citation entered a general appearance to each appeal (No. 233, pp. 162, 174; No. 234, pp. 171, 187; No. 235, pp. 166, 176), and admitted "personal service" of this citation upon them as parties and appellees. The petitioners were certainly parties to their own petition of intervention, and to the Court's order upon the same, and the respondent appellees were also very active parties to the same proceedings. The appellants do not seek to appeal from the decree of foreclosure, because they assume that the order appealed from excluded them from this right, and it is from this final and excluding order that their appeals have been allowed and consummated.

Voorhees v. *Mnfg. Co.*, 29 N. E. R., 738, 740.

Rust v. *United Water Works Co.*, 70 Fed. Rep., 129, 132.

IX.

APPELLANTS ARE ENTITLED TO A DETERMINATION.

The United States does not argue, but in its motion suggests, that the success of these appeals cannot now aid the appellants. The other parties to this appeal do not even mention this proposition, and the Government does not argue it. The Attorney General says in his brief that the purchaser at the foreclosure sales, under the decrees, which he says are exhibited by him to this Court by certified copy (p. 9), took all these Union Pacific properties "subject to ample protection in the decrees of all rights of the government in all other capacities than that of creditor, as to which (as creditor) its rights were fully satisfied."

If this reservation in the decrees saves appellants' rights against the purchasers, then the reason for the failure to argue the point on the part of all appellees, and the failure to even mention it on the part of all except the Government, become manifest. The other parties have not concurred in this statement of the Attorney General nor made any reference whatever to it. The decree for foreclosure contains, among others, this reservation: "all the rights of the complainant, the United States, not disposed of by this decree are hereby reserved to them."

The appellants desired a saving clause in the decree, and their original brief herein shows that it was the Attorney General through his special counsel that prevented such a clause from at once going into the decree.

Whether the rights of the appellants have been saved in the decree against the purchaser is a question that exceedingly troubles the appellants, and the purchasers have not yet admitted it. The appellants are indeed desirous of learning from this Court whether such is the fact or not, and even more desirous of knowing whether the liberties and rights sought by these appellants are of the nature of an organic servitude which could not be cut out nor defeated by these foreclosure proceedings, nor by a hostile Government.

The record shows that among the respondents to appellants' petition were the representatives of the reorganization committee and of the purchasers of the Union Pacific properties, and Judge Sanborn (No. 233, p. 145) required service upon the reorganization committee, and his order finds that the service was duly made, and yet on the hearing the Government said that the rights and liberties of the appellants would be *extinguished by the sale*, while Judge Dillon referred to said rights as an *organic servitude* which would survive any foreclosure sale, and the appellants pray a declaration of this Court upon this question of the liberties of the people under the Union Pacific legislation. The interest of the Republic in a large and commanding way is involved.

On this question of right and interest, the appellants submit that they are somewhat sustained in the right of intervention by the special legislation of congress in respect of these Pacific roads.

Section 10 of the Thurman Act (Act of May 7, 1878) provides as follows:

"Sec. 10. That it is hereby made the duty of the Attorney General of the United States to enforce, by proper proceedings against the several railroad companies re-

spectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of congress or right of the United States; and in any suit or proceedings already commenced, or that may be hereafter commenced against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the Court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to."

This section, in spirit, certainly covers intervention on a claim of right and interest, because it eliminates all objection on account of multifariousness, which is perhaps the only ground for a discretionary denial of intervention.

X.

ONLY AS A CREDITOR IS THE CLAIM OF THE UNITED STATES SATISFIED.

The Attorney General suggests to the Court (p. 9) that the Government *as a creditor* has been paid in full, and that the Union Pacific properties have been "long since transferred to the purchasers *subject to ample protection in the decrees of all rights of the Government in all other capacities.*"

This seems to us an added reason in favor of sustaining these appeals, and of sustaining the contention of the intervening petitioners, for if the payment to the Government as a creditor has been made in full it may possibly be held to have affected the rights asserted by

the appellants to have the President of the United States as an arbiter of the "just and equitable terms" under which their railroads may have a business connection with the Union Pacific system, but would still not actually deprive the appellants of the benefit of Section 15, of the Act of July 1, 1862 (12 Stat. 489, C. 120), for the Court, having the controversy and the parties before it, would go on and decide the entire matter, and itself fix the just and equitable terms of the business connection, and such is the prayer of the petition.

Joy v. *St. Louis*, 138 U. S., 1.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 50-1.

XI.

THE RIGHTS AND LIBERTIES OF THE APPELLANTS SOUGHT TO BE PRESERVED BY THEIR PETITION MADE INTERVENTION BOTH PROPER AND NECESSARY.

This matter is presented and argued in the original brief of appellants filed herein, to which the attention of the Court is respectively directed, and it is asked that the same be considered by the Court as though incorporated into this reply brief.

In each of the transcripts of record will be found a further discussion of the question, which is the same in each case, and to which the attention of the Court is likewise invited (No. 233, pp. 43-148; No. 234, pp. 53-158; No. 235, pp. 47-152). Assuming that the Court will adopt these references as a part of appellants' argument in resistance to the motion of appellees, only a brief reference to these matters will now be made.

Appellants seek the benefit of Section 15 of the Act of July 1, 1862. One of the appellants is a railway corpo-

ration, having already expended a million and a half dollars, and the other complainant represents an expenditure of nearly ten millions of dollars, all dependent upon or having in express contemplation a business connection with the Union Pacific Railway system.

Said Section 15 reads thus:

"That any other railroad company now incorporated or hereafter to be incorporated shall have the right to connect their road with the road and branches provided for by this act at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto." (12 Stat. 489, C. 120.)

In each of the suits this allegation appears (No. 233, p. 149; No. 234, p. 159; No. 235, p. 153):

"Said combination bridge was built for the purpose, among others, of securing connection with the Union Pacific Railroad as herein sought; and to that end received a vote of public aid from the city of Sioux City in the sum of about $300,000, and in the articles of incorporation of the aforesaid Combination Bridge Company, said company is empowered to construct, own and operate railways in the states of Iowa and Nebraska; and your petitioner brings this petition in behalf of said bridge company, as well as itself, and purposes and intends to amend in so far as may be necessary, if at all, its own articles of association so as to enable it to incorporate or cause to be incorporated such railroad company or companies as may be necessary to construct, operate and maintain such connecting railroads from its properties aforesaid with the Union Pacific Railroad as may be secured to your petitioner in pursuance of this intervention."

And the following further appears (No. 233, p. 151; No. 234, p. 161; No. 235, p. 155):

"Your petitioner, The Combination Bridge Company, a corporation duly created and organized under the laws of the state of Iowa, having filed with the secretary of the state of Nebraska a true copy of its charter or articles of association and a certified copy of the resolution adopted by its board of directors accepting the provisions of the Nebraska law making foreign corporation domestic, and duly becoming a body corporate also of the state of Nebraska, respectfully prays this honorable court to be permitted to intervene on its own behalf in the above entitled causes, but in subordination to the intervention of the Credits Commutation Company therein, and especially to intervene should the prayer of the Credits Commutation Company therein on its own behalf be not allowed, or should this petitioner, by reason of standing or otherwise, be found the better entitled so to do, by reason of having built a railroad bridge over the Missouri River from Sioux City, Iowa, to Nebraska, under corporate authority, and with the purpose of securing, as a continuation thereof, railroad connection with the Union Pacific Railroad under rights and privileges of existing laws of the United States, or for any other reason.

"Your petitioner, on behalf of itself, reaffirms and realleges herein all the statements and allegations made by the Credits Commutation Company in its petition as amended herein to intervene, as completely as therein stated and with the same force and effect as if herein fully set forth, including all the prayers thereof."

(See also No. 233, pp. 44-6; No. 234, pp. 54-6; No. 235, pp. 48-50.)

The appellants, therefore, represent some ten millions of dollars expended in extensive industries dependent upon railway facilities, and in part at least, with a view to, and the express purpose of, a connection with the Union Pacific Railroad system: The bridge across the Missouri River, itself costing a million and a half dol-

lars, was projected and built by said Combination Bridge Company, "under corporate authority, and with the purpose of securing as a continuation thereof railroad connection with the Union Pacific Railroad under rights and privileges of existing laws of the United States," not to mention the railroad running one hundred thirty miles west from Sioux City to O'Neill. The interest of the Credits Commutation Company in the Sioux City, O'Neill and Western Railroad, running 130 miles from Sioux City towards a suitable connection with the Union Pacific system, ought to be a sufficient evidence of its good faith (No. 233, p. 44; No. 234, p. 54; No. 235, p. 48).

The combination bridge over the Missouri River is itself a railroad bridge and a *railroad*, as shown expressly by the allegations of its petition of intervention and confirmed by the decision of this Court.

Ry. Co. v. *Bridge Co.*, 131 U. S., 371.

It is submitted that the appellants make the largest bid of wish and ability that was ever offered in the west for a right to participate in a public liberty and public benefit.

This Court has considered the Union Pacific legislation and the corresponding obligations and servitudes imposed thereby.

U. P. Ry. Co., v. *Hall*, 91 U. S., 343.

Counsel for appellees admitted that a railroad under the laws of Nebraska or the Interstate Commerce Act, or possibly the very section in controversy, might be entitled to "mechanical union," and the spiking together of rails at a switch, but deny the right of the President under the section above quoted to grant any "just and equitable terms" for a *business* connection. A merely me-

chanical connection would be unavailing. The law contemplates a connection of business with business as well as rail with rail. *The President of the United States is chosen for a larger purpose than the spiking together of iron rails on "just and equitable terms."*

It is submitted that a mere mechanical connection is not what the congress and the people had in contemplation when, under enormous bounties, there was created "A GREAT NATIONAL HIGHWAY UNDER NATIONAL CONTROL, * * * so far as the public and the government were concerned, AS ONE CONTINUOUS LINE," from the Missouri River to the Pacific Ocean.

U. S. v. *Stanford*, 161 U. S., 412.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.

There is a liberty of the people to apply to the President, a right in them to have his judgment, and power to have it enforced in court, all bought by and for and paid for by the people. THESE—THEIR LIBERTIES, RIGHTS, AND POWERS, AND OTHERS LIKE THEM SECURED TO THE PEOPLE—ARE NOT TREASURY ASSETS; they are not for sale at public auction—not to anybody, even an alien corporation, if it would bid the most.

The obligations and servitudes imposed upon the property that secure these are not due to the United States as such, but to the contrary and if necessary to the monetary loss of the United States. They are due to *these appellants* and to others who, as the appellants in fact, *may have made even vast expenditures in reliance upon these obligations and servitudes and in the enterprise which such promised benefits invited.* (No. 233, pp. 149-151; No. 234, pp. 159-161; No. 235, pp. 153-155.)

Let the United States sell, if it can and will, what belongs to the United States *as such;* let it not enhance the price by adding something which does not belong to it but to the appellants.

Beyond the price of that which pertains to the United States *as such*, the money consideration is no more the concern of the Court which fixed the bid than it was of the executive that secured it, and it was no concern of either. The question is broader than the mere collection of a debt.

U. S. v. *Union Pacific Ry.*, 160 U. S., 1.

The comprehensive scheme of this great national highway and the liberties secured to the people through land grants, bond subsidies and other concessions, have been recognized by this Court in many of its decisions.

U. P. Ry. Co. v. *Hall*, 91 U. S., 343.
U. S. v. *U. P. Ry. Co.*, 160 U. S., 1.
U. S. v. *Stanford*, 161 U. S., 412.

All the just and equitable terms which the petitioners sought in the connection to which they are entitled under Section 15 of the Act of July 1, 1862, were those intended to be secured to the Sioux City branch as well as to the other branches under Section 15 of the Acts of 1864, which reads:

"Sec. 15. And be it further enacted, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, *so far as the public* and the government are concerned, *as one continuous line;* and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation without any discrimination of any kind in favor of

the road *or business* of any or either of said companies, or adverse to the road *or business* of any or either of the others." See also 12 Stat., 489, 496, C. 120, quoted in 160 U. S., 1.

The appellants cannot be charged with delay. The rights for which they contend are vital. They have railroad, bridge and terminal properties in and entering Sioux City, and large stock yards and packing plants, which draw their supplies from all the territories occupied by the Union Pacific Railroads. All these cost ten millions of dollars, and the transportation properties were designed, acquired and constructed to accommodate and all depend upon some southwestern and transcontinental railroad connection. They believe they are entitled to this business connection with the Union Pacific properties upon "just and equitable terms." They are in deadly earnest and sincerely hope that the rights and liberties granted under the Union Pacific legislation are available to such beneficiaries thereof as the appellants herein, or either of them, and that their appeals will be heard. These appeals involve liberties of the Republic.

Respectfully submitted,

JOHN C. COOMBS,
HENRY J. TAYLOR,
Counsel and Solicitors for Appellants.

In the

Supreme Court of the United States,

October Term, 1900.

No. [illegible].

The [illegible] Commutation Company and the Combination Bridge Company, Appellants,

v.

The United States of America et al., Appellees.

Also No. [illegible].

[illegible] Appellants

v.

F. Coolbaugh Brown and Oliver Ames, Second, Trustees, et al., Appellees.

Also No. [illegible].

[illegible] Appellants

v.

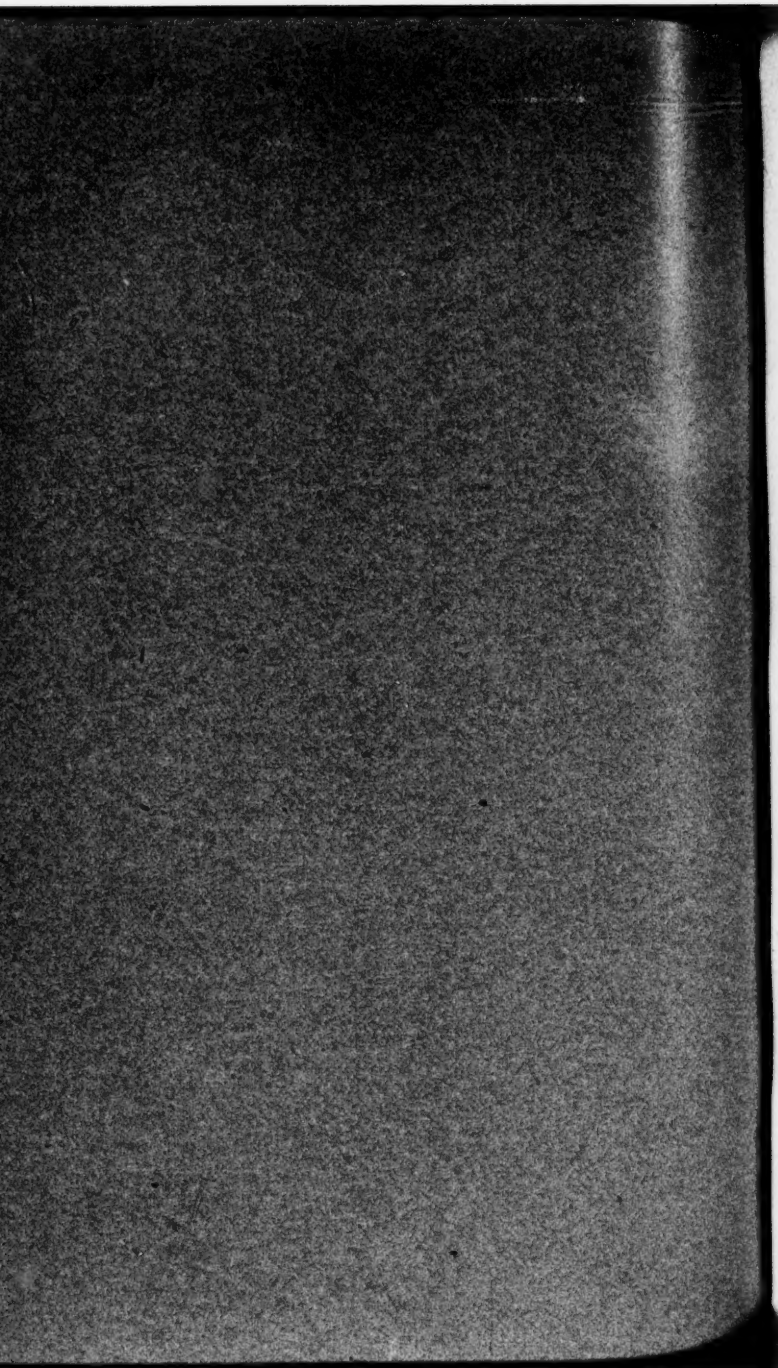
Oliver Ames, Second, and Samuel Carr, Executors, etc., et al., Appellees.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS RESISTING MOTIONS OF APPELLEES TO DISMISS APPEALS.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Counsel for Credits Commutation Company and Combination Bridge Company, *Appellants.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS.



upreme Court of the United States,

OCTOBER TERM, 1899.

233.

THE CREDITS COMMUTATION COMPANY AND THE COMBINATION BRIDGE COMPANY, *Appellants*,

against

UNITED STATES OF AMERICA ET AL., *Appellees*.

234.

SAME APPELLANTS

against

GORDON DEXTER AND OLIVER AMES, SECOND, ET AL. *Appellees*.

235.

SAME APPELLANTS

against

IVER AMES, SECOND, AND SAMUEL CARR, EXECUTORS, ET AL., *Appellees*.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

RIEF FOR APPELLANTS RESISTING MOTIONS OF APPELLEES TO DISMISS THE ABOVE-ENTITLED APPEALS.

Distance and illness have prevented consultation by counsel for e appellants in assembling a brief to meet the appellees' motion, d senior counsel asks leave to supplement the main brief.

Appellants' Statement.

The petitions were brought to protect and avail of rights thought to be secured to the petitioners to build a railroad southwest from Sioux City, to make a track and business connection with the Union Pacific Railroad, under Section 15 of the Act of Congress of July 1, 1862, (creating the Pacific Railroads Companies) which reads as follows: —

> Sect. 15. "That any railroad company now incorporated or hereafter to be incorporated shall have the right to connect their railroad with the road and branches provided for by this act at such places and upon such just and equitable terms as the president of the United States may prescribe. Wherever the word 'company' is used in this act, it shall be construed to embrace the words — their associates, successors and assigns — the same as if the words had been properly added thereto."

The petitioners want to make such a connection.

Simple good-faith interest is or should be essential to every petition for intervention, and so we think it pertinent to add: —

The petitioners and their predecessors expended between eight and ten millions of dollars in railroads, bridges, and terminals, in and extending into Sioux City, Iowa, all adapted to find their most profitable and efficient use in such connection as is herein sought. Especially has the Combination Bridge Company, petitioner herein, made such expenditure, to the amount of about a million and a quarter dollars, to bridge the Missouri, at Sioux City — mainly in reliance upon a hope and expectation of such connection.

These properties are not worth half as much without the connection as they would be with it.

The bridge connects with three great systems on the east of the river, only one of which crosses the Missouri River north of the Union Pacific Road, and that one only in the far north. A short track from the bridge would connect all these systems with the Union Pacific.

Substantially all of the stock of the Bridge Company is owned by its associate petitioner herein, the Credits Commutation Company, which last-named company also owns a majority interest in and

controls the Sioux City stock yards, which, with the large plants upon it, is the location of one of the great packing centres of the country. It is by far the largest industry in Sioux City, and there are but few, if any, that exceed it in importance in the whole Middle Northwest. To serve the trans-Missouri country, and the public generally, and to best serve itself, the stock yards should draw its live stock from the trunk and every ramification of the whole Pacific railroads systems.

These petitioners, Sioux City and the Middle Northwest, should enjoy all rights and facilities in the Pacific roads, freely and in competition with Kansas City and Omaha and other lesser packing centres on the north and south trend of the Missouri River between Kansas City and Sioux City.

It was so intended. This stretch of the Missouri River was to be the eastern base of the Pacific railroads through line, which single trunk, starting at the one-hundredth meridian (about where North Platte is now), should rest on three divergent branches, extending to the river at the three cities above named, as on a tripod.

This stretch of the river was foreseen to be, and for imperative natural reasons as well as from the Acts of Congress it is and always will be, a base line, not only for direct, but the principal one for all divergent and convergent, transcontinental or nearly transcontinental, transportation.

In the original Pacific acts, it was contemplated, that the Sioux City branch, projected from the original initial point of the main line of the Union Pacific at the one-hundredth meridian, would pass through Minneapolis and St. Paul to accommodate the middle northwestern country and lake transportation at Duluth, the most inland point.

The Kansas City branch, in like manner projected, was to accommodate the southeastern country and meet Gulf transportation at New Orleans; and the Omaha branch extended would accommodate the middle interior and the all-overland haul to the Atlantic.

The comprehensive scheme was recognized, and, in effect, practically declared as a fact judicially found by the Supreme Court.

U. P. R. R. Co. v. *Hall*, 91 U. S. 343.

U. S. v. *U. P. Ry. Co.*, 160 U. S. 1.

U. S. v. *Stanford*, 161 U. S. 412.

The plan in the original act was somewhat modified in the Act of July 2, 1864 — the so-called "Subsidy Act"; but the geography on which the plan rested, and the wisdom of the plan, were not changed.

Neither, indeed, was the purpose of the original act abandoned by the Act of 1864, and equal and impartial treatment in business, as well as connection, was secured to the Sioux City branch without adverse discrimination in favor of the other two, for it was still provided: —

> "SECT. 15. And be it further enacted, that the several companies authorized to construct the aforesaid road are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

The Sioux City branch of the Union Pacific provided for in these acts was evidently mislocated, and sanction for such mislocation was secured by misrepresentation made to the government. The road, as built, ran over seventy miles in a southeasterly direction down the east bank of the Missouri River to a junction with a part of the Chicago & Northwestern system, and thence turning west took that system across the Missouri River to Fremont. This branch from Sioux City to Fremont was one hundred and two miles long, and in its completion had reached a point on its way to the Pacific about two miles west of Sioux City.

The result was that the branch became a part of the Chicago & Northwestern Railroad. And another result of this wrongful mislocation, clearly shown on any railroad map, is an exception to our remarkable railroad development and extension during the past thirty years; an exception that cannot be paralleled elsewhere in the country.

Thus, besides the bridge of your petitioner, the Combination Bridge Company, there are only two bridges across the Missouri River from Omaha to the far north, one at Sioux City and one south of it at Blair, both controlled and in effect owned by the Chicago

& Northwestern system. There is no bridge from Sioux City to Bismarck.

There are three or four great systems other than the Chicago & Northwestern that come into Sioux City from the north and east, not one of which has crossed the Missouri or ever laid a foot of rail north of the Union Pacific Railroad. They have stopped, by force of artificial barriers, at the Missouri as at a Chinese wall.

All that the Chicago & Northwestern Company itself has built is laid herring-bone fashion, to side-track, as it were, or to exclude Sioux City and the Middle Northwest from connection with Union Pacific for transcontinental business.

The railroads of the Middle Northwest, twenty or thirty thousand miles of them, are and always have been with only one ostensible connection and without any practical connection with this great government-built transcontinental system of the Pacific roads; all to the undue advantage of Omaha, and of the Chicago & Northwestern Road and of the all-overland haul of Western products to the East. These discriminations against the northwestern country and the evils thereof were the result of the original mislocation, and it was for their correction that most of the petitioners' enterprises were designed and built.

The petitioner's bridge, already built, and a short track to the Union Pacific, when the place and terms of connection may be had, will take all the northwestern systems alike to the Union Pacific Road. The only barrier that now prevents is a denial of the rights to connection "on just and equitable terms," which terms, we shall submit, should be such as were secured to a Sioux City connection as well as to the other branches, "without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

This contention is so just and fair that the judge of the Circuit Court did not have the heart willingly to resist it, and after the petitioners had practically concluded their argument for connection, and before they offered any argument that the bond-aided Pacific railroads could not be sold separately in foreclosure, the judge interrupted.

Leave is asked of the appellees to quote from them and from the Court at the hearing: —

"Judge SANBORN. Perhaps, Mr. Coombs, the counsel on the other side would be willing to concede that there should be such a provision in the decree. How is that, Mr. Pierce?

Mr. PIERCE. It is the law now, if your Honor please, the most ample and complete provisions for connection.

Judge SANBORN. But the question is whether you are willing that there should be inserted in the decree the same provision.

Mr. PIERCE. The provision, *as I understand*, your Honor, for *mechanical* connection with the property, that is the construction which has been given by the Supreme Court to provisions in sections for connections of this character, the *mechanical union* of the property. I do not think there would be any objection —

Mr. HOADLEY (*for the government*). This is not the time now. If the Court please, when Judge Cornish comes to the hearing, there will be a good deal to be said about —

Judge SANBORN. There will be, but if you are willing that this question should be inserted in this decree, it is unnecessary to further argue the matter.

Mr. HOADLEY. I don't believe I am willing to put in anything that would satisfy Mr. Coombs. I know him too well for that. If you concede one thing he wants, he wants another. I don't mean anything against my friend Coombs.

Judge SANBORN. Mr. Coombs, you may proceed."

Then, and not before, the petitioners submitted their argument that the road could not be sold under the pending bills.

The evils which the petitioners sought to correct were due to the mislocation, or to the misrepresention by which the sanction of the Government appeared to have been given to the mislocation, of the Sioux City branch of the Union Pacific, called the Sioux City & Pacific Railroad.

If the bond-aided Pacific system was to be broken up (as petitioners thought, and still think, illegally broken up), still if the Union Pacific main line was to be sold separate and apart from the Sioux City branch, as it was sold, then the petitioners wanted the right to build a connection of their own to the Union Pacific, without subsidy or endowment, to build to the road in the hands of the purchaser, under the provisions of Article 15 of the Act of July 1, 1862,

above quoted, and they wanted to show that the just and equitable terms which they should ask were to be such as had by law pertained to, but never enjoyed by, the mislocated Sioux City & Pacific branch.

That the foregoing charge of mislocation may not be thought to be a figment of a brooding imagination, it may be said, as the petition shows, that the wrong was flagrant and notorious. It has been the subject of much debate in Congress. No report of a commission or committee of Congress has failed to notice it. The Railroad Commissioners' annual and special reports have frequently referred to it. The legislatures of the middle northwestern States protected at the time. The commercial and other associations in the cities and towns of Wisconsin, the two Dakotas, Nebraska and Iowa have petitioned the Congress for relief from it, while reorganization legislation was pending. The expenditure in the properties of the appellants to correct the evil was participated in by the people. Sioux City alone voted and paid over three hundred thousand dollars of aid. The bridge we built is open to all railroads. Congress gave the charter, and the Secretary of War may regulate the tolls.

When the refunding Union Pacific bill was pending before one Congress, and the reorganization bill afterwards before another Congress, the opposition to the passage of either, without some correction of the foregoing evils, -- that is, without an amendment to the bills which should secure a connection to Sioux City and the Middle Northwest with the Union Pacific, — was so great, especially on the part of your petitioners, that both of those proposed measures of Congress were overwhelmingly defeated ; and it may be said there was this much of patriotic result due to the petitioners, that the government realized about twenty millions more from the property than it would have received under either bill ; but even this vast sum is no measure of the loss to the Middle Northwest if the courts have done what the Congress would not do — that is, sell the road without securing the connection.

During both of the contests in Congress, these suits now at bar, except the one brought by the United States, were pending, and except that the others were stalled for the want of an appearance by the United States. Within a week after the defeat of the last proposed reorganization measure, the President of the United States,

Mr. Cleveland, directed his Attorney-General to bring foreclosure proceedings against the Union Pacific to enforce the government lien, and also to appear in the pending litigation in the other suits.

As soon, practically, as the government thus intervened and undertook to proceed affirmatively, the petitioners followed the contest into the new field, and filed their petitions herein.

Brief.

The foregoing recital sufficiently answers some of the erroneous statements in the brief of the appellees. Thus, the appellees say that the petitioners sought, first, to prevent a sale of the Union Pacific in foreclosure, or, in the alternative, to secure a connection with it. In truth, the petitions were brought to secure the connection, or, in the alternative, to prevent the sale. The petitioners do not, more than other citizens, care who owns the road, if they can have free and favorable track and business connection with it, without prejudice or adverse combination or discrimination, — all as contemplated and secured by the law which created and endowed the Pacific railroad companies.

Again, the appellees suggest that the petitioners were dilatory in presenting their intervention. Not so; the petitioners were in no danger until the government purported to bring its new suit and become a party to the pending ones. An intervention before that would have been impertinent. Prior to that time, the petitioners were meeting the contest where it was waged, — in Congress, — and where we think it belonged exclusively, and where it was pending as unfinished business when the Executive Department invoked the Judicial Department of the government, all without authority of Congress.

Argument.

The appellees support their motions with two reasons worthy of consideration:

First. They unite in saying that the order denying the intervention was one of discretion, and so not final and so not appealable.

Second. The attorneys for the government urge that the United States cannot be sued without their consent.

PART FIRST.

Of the First Reason.

(1) *The appellants submit that if by construction the order of the Circuit Court may be held to be one of discretion, and if by general rule discretionary orders are not appealable, still the objection to the appeals is not adequate in these cases.*

The aid given by the United States to the Pacific railroads was probably the largest endowment ever bestowed by any government on any enterprise in our own or any time, and the result was the creation of the greatest developing agent that any people ever enjoyed. That was the return and consideration hoped for, and it was secured forever by the terms of the section of the act on which we rely. It purported to secure certain rights which pertained to the government *as such*, and certain other far more valuable rights which pertained to the people.

Union Pacific R. R. Co. v. *Hall*, 91 U. S. 343.

The interests involved were too vast and of too high a character to be met and defeated or delayed by technical objections.

If we may illustrate: A justice of this court once said of a member of his local home bar that he carried his Americanism too much into his profession, and evidently thought that all questions of law were born free and equal.

Indeed, in this connection it is more than questionable whether the special Acts of Congress governing litigation that involves the bond-aided Pacific railroads, Acts familiar to and heretofore recognized by this Court, do not show or even declare that technical rules which would govern other cases shall be disregarded in these.

Thurman Act (May 7, 1878), Sect. 10.

(2) *The order, if construed as discretionary in law, was nevertheless final in fact in so far as it imposed a present injury, an irremediable obstruction, hindrance and delay.*

An order may be final or not according to the circumstances.

Thus, the rights secured to the petitioners were protected in the executive and not in the judicial department of the government until or unless the judiciary had interferred. This is not a case in which

doubtful intervention in a suit should not be allowed to delay the suit, but it is one in which a doubtful suit ought not to delay the government or the people in the enjoyment of their rights, liberties or franchises.

When the petitioners wanted to build their connecting line, the Union Pacific road was, rightfully or wrongfully, in fact in the hands of receivers in these cases. It was physically in the custody, and financially under the management, of the courts that operated it. An exercise of the petitioners' right to connect and to joint operation would interfere with both possession and operation. What were the petitioners to do?

Their rights were not suspended, but nothing could be accomplished by an original suit to enforce their rights in the same or any other court. They could meet their difficulty only in the suits and court wherein the road was held and operated.

It may be said that they should have applied to the president; but if the road was rightfully in the hands of a receiver, interference would have been contempt, as much so by the president as if by the petitioners.

Suppose the petitioners had written to the president to perform his office in the matter, would not his answer in view of the litiga tion have been that he had referred the matter to the law department? We may state hypothetically that it would be. We may also state, as matter of fact, — though it can do us no good for it is not in the record, — that that is what he did answer, for we tried it.

This Court has ever been mindful of the rights and liberties of the people, not only that they be not ultimately lost, but that they be not thwarted, hindered or delayed. This order that excluded the petitioners from the only litigation in which they could have relief, either then or so long as the receivership under the pending suits should continue, was a present injury, final in every moment of its continuance; as much so as an order which excludes from a receivership suit without relief a party entitled to the rent, income or use of the sequestered property. To do that is not within the unreviewable discretion of a subordinate or any other court.

(3) *The petitioners could intervene as of right, and to exclude them was a present legal injury, irremediable elsewhere.*

The intervention of equity may be had because of a suitor's

reasonable fear of an injury that threatens. The injury need not have happened. These suits were a menace. The petitioners feared (it is so stated in their petitions) that the pending foreclosures would deprive the petitioners of a protection of their rights by the constituted tribunal, the President of the United States.

The fear was reasonable. By the law as it had been enacted, the President was to determine the place at which, and the just and equitable terms upon which, the petitioners or anybody else should have a connection with the Pacific Road. This was a unique office to impose upon the President. Was it constitutional?

While the United States had an interest, a paramount interest, in the roads, the petitioners were not alarmed, for the authority of the President to determine the questions submitted to him would undoubtedly be construed as a power coupled with an interest in behalf of the United States and so held to be a valid power; but if the government were to unite in the sale of the road substantially free from all powers to be exercised in behalf of the government, then the powers imposed upon the President would cease to be coupled with an interest in the United States as such, and his determination of *just* and *equitable* terms, places, and the like would be merely a judicial function which the executive department cannot exercise. The petitioners thought, and still think, that our organic law would make this distinction.

Therefore, when the government appeared to move for a sale in co-operation with the Reorganization Committee of the Union Pacific Railroad, the petitioners sought to intervene, and assigned, among others, the foregoing reason therefor.

Whether the petitioners may be right on the merit of the above question or not is not the question here now, but the question is whether their fear that they might be right was reasonable and one from which they should have been relieved in the threatening suits.

Equity not only permits but requires a party to proceed in the time, place and manner which will enable the Court to afford the relief sought. The rules that govern intervention are no exception to this. If it is a pending suit that threatens the injury, that suit must be controlled; and, if the party aggrieved cannot control the suit and restrain the threatened injury otherwise, he is of necessity

a party to that suit in his own right and to protect his own interest.

The government now purports to have sold out its interests at auction, and the question still is whether any of the rights and the liberties of the people were knocked down on the same block, at the same time, and as a part of the consideration for the one price.

If the petitioners' only relief was to invoke the intervention of the President, does any reasonable man doubt that an appeal now to him would be futile? It was so before the sale. Much more would it be so now since the government once opposed the right sought by the intervention and received an increased price for the property because of the denial of the petitioners' right. Could the President who did this, or any of his successors, honorably interfere in behalf of the petitioners afterwards? It is safe to say they would not if they could.

(4) *The order of the judge of the Circuit Court denied the petitions, not as a matter of discretion.*

The appellees argue for a legal fiction, that the circuit judge's order was one of discretion, and that it was not appealable. He himself says that it was not of discretion, and he granted an appeal.

If the fact and truth of the court may be taken as superior to the argumentative fictions of opposing counsel, the appellants are somewhat embarrassed to find need of any argument on their own part. Legal fictions may be introduced from necessity and possibly for convenience, but never against a substantial right.

Indeed, if the denial of the petitions was not final, they were not denied at all. There is in the order, no simple unqualified denial of the petitions, only a recitation that they are not denied, as a matter of discretion, followed by an allowance of an appeal.

The appellees contend that the order must be construed by itself, and that the reasons given in the opinion are irrelevant. The opinion deals wholly with matters of law, and the opinion impliedly denies the petitions, though it does not say so; while the order, taken apart and by itself, from its punctuation and sense alike, is not a denial, but a qualification and limitation, which makes the implied denial final and grants an appeal.

It says that the "prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as a matter of discretion," etc., and grants an appeal.

(5) *If the law, as applied to the order, renders the latter discretionary notwithstanding its terms, a patent ambiguity is presented in that an appeal purports to be granted on a discretionary order. Some evidence outside of the order should be admissible to explain it.*

The appellees most earnestly oppose any consideration of the opinion in this case, and, presumably, of the facts and arguments in the original hearing as well.

These cases present jurisdictional questions under the laws of the United States, and the appeal might as well have been directly from the Circuit Court to this court. The question might as well have been brought up directly on *certiorari*. In either event the opinion of the Circuit Court was a part of the record, and the briefs or argument and the evidence, for the appellees introduced evidence by affidavit, would also have been or might have been made a part of the record, and very likely may be now so considered.

These, if considered, take all doubt out of the order and show that it was intended to be final. Everybody wanted it to be so.

Substantially all of the arguments and the evidence were on the merits and on the law.

The purchasers wanted a decision which would enable them to buy and pay for the road free not only from all liens and rights of the government not specially reserved, but also free from all interference on the part of any of the people.

Concerning laws creating and endowing the Pacific Railroad, the main argument of Judge Dillon, and brief and argument of Mr. Pierce, was that the Interstate Commerce law and the laws of Nebraska had superseded Section 15 of the Acts of July 1, 1862, and that the petitioners had no rights save such as all the people enjoyed, under the Nebraska law and the Interstate Commerce law, as construed in analogous cases, which would give to the petitioners a right merely to a mechanical or switch connection. Judge Dillon, not without eloquence, said: —

> "This was one great transcontinental line projected through hostile Indian tribes over wildernesses and mountains. If it was ever to be built it was not dreamed of that it would be paralleled ever or in a remote time. The whole scheme shows you that it was thought if Congress thus crossed the deserts and the mountains with this line, that those through the well-settled

portions of the country would converge to it, and so it provides for a connection of all these branches and a continuous operation, and it provides, so far as the companies which composed the Pacific family are concerned, those which are subsidized, the Kansas branch and the Central branch and the Sioux City branch, that there shall be no discrimination between them, but that provision is limited to the members of the Pacific family. This has become unimportant now, because this provision against discrimination in this section of the Pacific Railroad, against discrimination among the members of the family, is no more than the general provisions of the Interstate Commerce Act — ceased to be of any particular value."

And the counsel for the government of the United States wanted a decision adverse and final to enable the United States to realize a price for the Treasury of the United States enhanced by a decision denying the petitioners' rights.

Besides, we had had an anti-paternal Democratic administration, one that had not bowed the knee to populism, and its attorneys well represented its time-honored sentiments.

We ask leave of the government to quote a short passage from the hearing: —

"Mr. Coombs. The Judge (Hoadley) does not think it a good thing for the United States to have anything to do with the railroad anyway.

Mr. Hoadley. Right you are.

Mr. Coombs. I say, is so anxious for the United States to get rid of it that he does not care what becomes of it.

Mr. Hoadley. Provided its value is paid in to the United States under existing law; yes, sir."

Right here we beg leave to refer to the opinion of the Circuit Court judge: —

"There is another ground upon which intervention is sought. It is that these petitioners are members of the public, and that they have a right to intervene for the purpose of protecting the interests of the citizens of the Republic. But the answer to that is, that the United States, by the officer upon whom the duty is imposed of protecting in this litigation the interest of all the citizens, is prosecuting one and defending the other of the suits for foreclosure. As a member of the public, neither of the petitioners has an interest different in kind from that of every other member of the public resident in the same locality, and upon well-settled principles they are not entitled to intervene upon this ground."

This is not the language of discretion, evasion or postponement, but it is certainly final of a right of a citizen under the law as the Court believed the law to be. But as a proposition of law the question cannot be distinguished from the question in Union Pacific R. R. Co. *v.* Hall, *ubi supra*, and it was erroneous if that decision was right.

By that decision, the law officers of the government do not represent the citizens in the enforcement of the rights that do not pertain to the United States as such, but pertain to the citizens. That in these cases the law officers of the government did not protect but rather endeavored to sell out the rights of the citizens for a price to be paid to the United States "as such" was palpable and not concealed.

We may add in this connection that there is no ground of intervention in equity better recognized than that which a beneficiary under a trust has when his trustee will not protect him and has an adverse interest.

On the whole, and on the contention that the order was discretionary, if the Court is not convinced that the order was final, there must at least be doubt. To hold it to be discretionary does in some measure asperse the intelligence of the eminent jurist that made it, for thus construed he purported to grant an appeal on a discretionary order. So does it asperse his patriotism, since it withheld a right from the people; and palpably it denies his official truth.

If this case on its merits appeals to this Court, the technical question raised, or defective form of its presentation, are not adequate. It is evident that the denial was a present injury, a present denial of a right. Under such circumstances an appeal may be made to the rule under which the appellees make their motion. It is true that the appellees may make their motion as of right, but it is also true that the time in which this Court will decide it is in the *discretion* of this Court. This Court may sometimes have been thought to construe the law very favorably to the Pacific railroad companies as against the government, but on the other hand it has always been scrupulous, even generous, of the rights secured to the citizens in this great enterprise.

We think the Court should hear the merits of the case, and we think the rule contemplates that in such cases the Court will hear the merits before it decides the motion. The rule reads: —

"All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted *in the first instance* on printed briefs or argument. If the Court desires further argument on that subject, *it will be ordered in connection with the hearing on the merits.*"

The time to decide these motions is after the appeals are heard. To decide then cannot possibly injure anybody, but to decide before may do great injury.

PART SECOND.

Of the Separate Ground for Dismissal urged by the Government:—that the United States cannot be Sued without Consent.

This is more than conceded and is easily disposed of. The United States cannot be sued without their consent, and no branch of the government has any authority to give the consent but Congress, and it is the affirmative duty of the Court, of its own motion, to raise the objection and to stay all suits not brought by the government, or in which the government is not made a party, until the government does authoritatively appear.

To this law, however, there is some modification. When the United States do submit themselves to the jurisdiction of the court, they are subject to all the vicissitudes that beset any other suitor, which is enough for this case.

But we cannot allow the United States to escape their proposition with this answer.

These petitions were brought to secure a right to connect with the Union Pacific at a proper place and on just and equitable terms, or, in the alternative, *to prevent a sale in foreclosure in the pending suits.*

The most of the petition was devoted to a demonstration that the railroads composing "the connected and continuous" road from the Missouri River to the Pacific Ocean could not be broken up and sold separately or at all.

The petitioners think that their petitions were denied by the circuit judge because the petitioners, if admitted, intended to present that view if they could not get a satisfactory connection.

As above shown, the Circuit Judge was not averse to granting a connection to the petitioners, but was, of course, averse to any show-

ing that the suits which were and all the time had been under his control could not be pushed to the contemplated foreclosure sale.

It was said in court by the counsel for the government that the judge upon the bench had required the government to appear in the Ames suit and in the Dexter suit at the time he entertained the government's original bill to foreclose on the government's lien. The Court did not gainsay it. It was said by the government's attorney, in answer to the petitioner's contention that neither the President nor the Attorney-General had any right, without authority of Congress, to appear for the United States in either of the pending suits.

The petitioners, believing that they encountered much prejudice to their assertion that the Pacific railroads could not be sold at auction without the consent of Congress, did, in the hearing before the Court of Appeals, confine themselves mainly to the argument for their right to a connection. They will do so again if they shall be herein heard on the merits.

But the motions and briefs to dismiss utterly ignore the petitioners' contentions that the roads could not be sold in foreclosure under the pending suits in which the intervention was filed.

Perhaps they can be, but, if so, law and logic fail us. Whether they can or not, however, was a question which could be effectively decided only in those cases themselves, and to deny a petition to intervene, for the purpose of showing that they could not be so sold in those cases, was final of the right to make the showing and was appealable.

We do not intend to much further elaborate the interest which the petitioners had as a foundation for their right to intervene to prevent a sale, nor at this time to present much argument that the action of the administration was unauthorized and the sale unlawful.

But the action of the administration in authorizing participation in the litigation within a week after the defeat of the so-called Powers bill was a surprise to all Congress, and we think to all the country. The matter was still pending as unfinished business in Congress at the time.

There was and is not anything now to prevent the disposition of the entire Pacific railroads situation by Congress. We do not hesitate to say that, in our opinion, however honest and wise the admin-

istration may have been in its action, it nevertheless did usurp the functions of a Congress which was certainly in the legal exercise of its own powers over the roads.

Of the petitioners' rights it should be sufficient to cite, for the purposes of this brief, *Union Pacific R. R. Co.* v. *Hall*, ubi supra.

The citizen, without the intervention of the United States as such, does have standing to enforce the rights secured to the citizen in the Pacific roads, and to compel the entire Pacific railroad system to operate throughout its entire chartered length as a connected continuous line.

The continuity and unity of the roads composing the transcontinental line from the Missouri to the Pacific was the most conspicuous feature of the acts creating and endowing the companies. The very title of the original act was, "An act to aid in the construction of a railroad and telegraph line *from the Missouri River to the Pacific Ocean*, and to secure to the government the use of the same for postal, military and other purposes."

The acts constantly speak of it as one railroad.

By Section 12 of the same act, "the tracks upon the entire line of said railroad and branches shall be of uniform width, so that, when completed, cars can be run from the Missouri River to the Pacific coast."

Section 17 of the same act said: —

> "Provided that if said roads are not completed so as to form a continuous line of railroad ready for use from the Missouri River to the navigable waters of the Sacramento River in California," etc., all the roads were to be forfeited to the United States."

Section 15 of the Acts of 1864 said: —

> "The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the government *and the public* are concerned, as one connected, continuous line."

By the Act of March 3, 1869, the right to extend the Kansas Pacific line was granted, but it was enacted —

> "All the provisions of law for the operation of said Pacific Railroad as a continuous line shall apply to said extensions."

Section 15 of the Act of July 2, 1864, hereinbefore quoted, which secured co-operation between the roads and branches without dis-

crimination, and re-enacted that they were to be operated as a continuous line, was, by Act of June 20, 1874, amended so as to make it *a criminal offence for those having the roads in charge to refuse so to operate them*, and imposed effective damages on the companies in behalf of anybody aggrieved by a refusal, and by the same act the Denver and Cheyenne connection was again made a part of the *continuous line.*

By Section 11 of the Thurman Act (May 7, 1878) the failure of any of the companies to perform the requirements of any of the acts aforesaid, for a period of six months, should operate as a forfeiture of "all rights, privileges, grants and franchises derived or obtained from the United States."

By the Acts of May 3, 1873, any Circuit Court of the United States can issue mandamus to the Union Pacific Railway Company to compel such continuous operation. Any citizen can invoke it.

Union Pacific R. R. Co. v. *Hall*, ubi supra.

In the proposed sale in the pending cases, the Union Pacific Railroad alone was to be sold, free from its connections with other members of the Pacific Railroad family, especially free from the Central Pacific and the Sioux City & Pacific (the Sioux City branch), which were not to be sold, and so the communities of the Middle Northwest, as well as the interests owned by your petitioners and others, were to be cut off from connection with the system.

More than this, by Section 17 of the Act of July 1, 1862, not modified or changed by subsequent acts, the United States can take the whole of the roads of the Pacific family and use the income of the whole to repay the expense of keeping all or any in repair.

And by the eighteenth section of the same act, still unrepealed and unaffected, it is provided: —

> "And be it further enacted that, whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rate of fares thereon, if unreasonable in amount, and may fix and establish the same by law."

That included the whole "continuous and connected" line.

For this partial showing of our reasons, we contended for admission to show that the Union Pacific could not be sold in fragments separately; in other words, that the main line could not be sold out of and free from all connections with Sioux City and the Middle Northwest and the Pacific, even if it could be sold at all without an Act of Congress.

Nay, more; we contended that none of the roads of the bond-aided Pacific system could be sold at all. The rights of the public were paid for and had vested. Such sale was not the government's remedy for default. The acts everywhere provide that the remedy to the government for default on the part of the companies to the government is forfeiture.

This is set forth in Sections 5 and 6 of the Acts of 1862, and especially by Section 11 of the Thurman Act (May 7, 1878), and finally it has been so declared by this Court in a decision which has been subjected to wider criticism from those who did not understand it, perhaps, than any decision ever rendered by this Court. It was the decision in the case wherein this Court decided that the interest on the subsidy bonds was not payable till the principal matured. *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72. The argument in that case, made by the defendant railroad company itself, was as follows: —

> "Throughout the charter, the provisions to protect the government, we submit, are in clear terms, either in indisputable common law strict conditions or a mortgage which is shaped as a strict condition, allowing no equity of redemption but providing a mere summary forfeiture."

This Court practically adopted that construction in that case and, dwelling upon the fact that a forfeiture would follow any default under the sixth section of the Act of July 1, 1862, held that there would be default in the payment of the interest on the subsidy bonds only when the principal matured, at which time —

> "There was left for the government the entire property of the corporation, of which immediate possession could be taken on a declaration of forfeiture . . . Congress . . . rested satisfied with the entire property of the company as security for the ultimate payment of the principal and interest of the bonds."

In this connection, and in contemplation of the consequences of any sale, we earnestly request this Court to review its opinion in *United States* v. *Union Pacific Railway Co.*, 160 U. S. 1.

Now, for a remaining word on the argument of the counsel in behalf of the government that the United States cannot be sued without their consent.

This means that if we cannot intervene in the suit wherein the United States has submitted to jurisdiction, we can have no control over the United States in any other suit.

But on this matter, and on the action of the Attorney-General or the President, we desire to quote from the report of the minority of the Pacific Railroads Committee in Congress, made on a bill which Congress was considering after the legal proceedings on the part of the government had been instituted. We think it good fact and law. It is alleged in the petitions: —

> "It should be first noticed that the Attorney-General does not purport to have been guided so much by his duties as the law officer of the government as he does by his abilities as a trader. His first public announcement of what he had done rested his justification on the guaranteed bid he had secured and the deposit he had obtained. The legal procedure he has instituted as Attorney-General is all ancillary and subordinate to this. But the Attorney-General's authority cannot depend upon the price — if he could sell out for $46,000,000, then equally, he can do so for forty-six cents; and his office does not empower him to sell at all.
>
> But the Attorney-General's procedure in pursuance of the agreement was more in excess of his authority than was the agreement itself — for he did not merely bring foreclosure proceedings in behalf of the government's lien, but filed his appearance for the United States in the pending foreclosure suit in behalf of the first mortgage bonds, whose holders assert a lien in priority to the lien of the government, and, as this minority is informed and believes, his bills were actually filed in this prior foreclosure suit. He does not so much foreclose for the government as he subjects the government's interest to foreclosure. For his want of authority to do this, attention is called to a few decisions of the Supreme Court of the United States: —
>
> 'Without an act of Congress no direct proceedings will lie at the suit of an individual against the United States or its property, and no officer of the government can waive its privilege in this respect nor lawfully consent that such a suit may be prosecuted so as to bind the government. (Headnote [in L. Ed.] by Mr.

Justice Bradley, who gave the opinion in *Carr* v. *United States*, 98 U. S. 433.)

Comptrollers of the Treasury cannot submit the rights of the government to litigation in any court without some express provision of law. (*Case* v. *Terrell*, 11 Wall. 199.)

Claims against and liens upon property of the United States are incapable of enforcement except when such property becomes subject to the control of the court. (*The* [*ship*] "*Siren*" v. *United States*, 7 Wall. 152.)

Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity. (*Hawkins* v. *United States*, 96 U. S. 689; *Whitsides* v. *United States*, 93 U. S. 247.)

When the property of the government is concerned, it is proper for the attorney for the United States to intervene by way of suggestion, and in such case, if the suit be not stayed altogether, the court will adjust its judgment according to the rights declared on the part of the government thus intervening. (*Stanley* v. *Schwalby*, 147 U. S. 508, 513, and citations; see also 7 Cranch, 116–147, the leading case.)

When a State or the government is a necessary party defendant, the Court will decline jurisdiction, and the proceedings will be dismissed. (*Cunningham* v. *Railroad Company*, 109 U. S. 446–451.)'"

In some measure against this, the attorneys for the government say in their brief, in support of the motions, that the Union Pacific has been "long since transferred to the purchasers subject to ample protection in the decrees of all rights of the government in all other capacities." This assertion is constructed not without art. If its intended implications were true, it would not be sufficient.

The attorneys say they submit copies of the decrees. We have none at hand, but our memory is that there was a reservation of only such rights as pertained to the United States, referring principally to a mail service for fair rates, which was really an additional benefit to the purchasers.

But nothing of the rights of the people was reserved in any decree, and, as the petitioners remember, the reservations of rights to the United States was made only in the decree in the suit of the United States. So that all the United States saved in the decree in their own suit on the foreclosure of the second mortgage, they lost in the foreclosure sale under the *first mortgage* at the same time, and in

which suit also the United States purported to appear as a party defendant and was bound, and in which the decree contained no such reservations.

The decrees are before the court so that the court may see if the petitioners remember rightly. It is, however, enough, if the rights secured to the public under the acts quoted were not reserved, and it is not contended that they were.

The petitioners were entitled to standing to see that they were, and as they were not, the exclusion of the petitioners proved to be in fact, as it was in law, final. That is, if it be conceded that there could be any such sale.

The appellees also urge that the United States have been paid in full, and that the roads are, in justice as well as law, quit of the government and the people. The effrontery of this eclipses its ingratitude. The interest on the deferred interest would amount to about as much as the original principal and interest; was that repaid?

The land grant, too, was worth as much as the original bonds.

"The United States have been paid"? When was there another such creditor?

If the purchasers got all they claim, — all that the petitioners were excluded from asserting, — there was not so great a sale of liberties when slavery prevailed in all the States.

Americans have been shot down like dogs by federal troops, in pursuance of the orders of the federal judiciary, because they so much as obstructed or conspired to obstruct the performance of a mail contract of the United States, till some of the people murmur that "government by injunction" is murder legalized before the fact, and others do say that it is always in behalf of the corporations and against the people, but most of them are more patient and loyal and say it is the law.

Here was what this Court called "a great national highway," built by government money, the means of the government and the people for intermountain and transcontinental mail and telegraph communication, the greatest military arm of any nation at any time, and for the hope it held out in the rights secured to the people it was, and is, the inducement and base of operation for every pioneer and enterprise in the new empire it opened. The unity, continuity and use-

fulness of the whole was founded in reiterated national statutes, and protected by a special penal code.

What, then, should be the deserts of an executive department or officers and a syndicate which conspire to and claim to have achieved the utter dismemberment of the completed work, an auction sale and purchase of its fragments, and the dissipation of all its promises, uses, and duties?

Shall they be approved on a lawyer's motion that these matters rested in the discretion of a circuit judge.

It was thought at the time the government appeared in the suits, that the purchasers of the Union Pacific Railroad would have to come to Congress for a charter to enable them to operate their properties, and it was thought that Congress could then see to it that the rights of the government and the people should be protected. Instead of that, however, this vast system seems to be run under a charter obtained from the State of Utah, and the corporation shuns no place more than the forums of the people who created and endowed it.

Coming from Utah, it has, of course, as much standing in federal tribunals as if from another State; but if the consequences of the sale are that the vast powers and high destinies and duties imposed upon these properties can be thwarted, directed or controlled by such charters as any one State may see fit to grant, alter, amend, or repeal, isn't that a sufficient answer to the legality or possibility of such a sale? Did all the former statutes, all the declared justice and wisdom of this tribunal in behalf of the people on the matter, go to the highest bidder? And is the citizen without standing and the Court without jurisdiction to stay or to object?

The last ditch in which this court has always been entrenched to save remedial acts for the government and the people, the great reliance of all Congress and of the noble Thurman, worthy of mention in particular, the abiding comfort of the people herein, has ever been in one section of the original act, so familiar that we almost know it by heart, Section 18, Act of July 1, 1862: ". . . And the better to accomplish the objects of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to

secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, *Congress* may at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

These motions at bar, made by the executive department and by the purchasers, are to substitute "Utah" for "Congress" in the above act for fifty million dollars."

The answer we expect is, "Not if it were billions."

Respectfully submitted,

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